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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 358.

MOORE-MANSFIELD CONSTRUCTION COMPANY,
APPELLANT,

ELECTRICAL INSTALLATION COMPANY, WILLIAM A.
GUTHRIE, ALLIS-CHALMERS COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF INDIANA.

FILED OCTOBER 11, 1912.

(23,381)

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1 Pleas of the District Court of the United States for the District of Indiana, begun and holden at the United States Court House in the city of Indianapolis, in said District, on the first Tuesday in November, in the year of our Lord one thousand nine hundred and eleven, before the Honorable Albert B. Anderson, Judge of said Court.

No. 10961. Chancery.

ELECTRICAL INSTALLATION COMPANY

v.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY
et al.

Complaint.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY

v.

ELECTRICAL INSTALLATION COMPANY et al.

Cross-complaint.

THE MOORE-MANSFIELD CONSTRUCTION COMPANY

v.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY.

Cross-complaint.

THE MARION TRUST COMPANY, Trustee,

v.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY.

Cross-complaint.

WILLIAM A. GUTHRIE

v.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY
et al.

Cross-complaint.

2 Be it remembered that heretofore, to-wit: at the May Term of said Court on the 26th day of June, 1909, before the Honorable Albert B. Anderson, Judge of said Court, the following proceedings in the above entitled cause were had, in the Circuit Court for said District, to-wit:

Comes now the complainant by Messrs. Fyffe & Adcock and James W. Noel, Esq., its solicitors, and files its bill of complaint in the above entitled cause, in the words following, to-wit:

To the Honorable Judges of the Circuit Court of the United States for the District of Indiana:

Your orator, Electrical Installation Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a citizen and resident thereof, having its principal place of business in and being an inhabitant of the city of Chicago in the Northern District of said State, Eastern Division, brings this bill of complaint against the Indianapolis, Crawfordsville and Western Traction Company, and thereupon your orator respectfully shows unto your Honors that:

1. Your orator, Electrical Installation Company, is a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois and is a citizen and resident of said State of Illinois and is authorized by its charter to transact business and do such other things as were necessary in connection with the matters hereinafter stated. The said defendant, Indianapolis, Craw-

3 fordsville and Western Traction Company, is a corporation created, organized and existing under and by virtue of the laws of the State of Indiana and is a citizen, resident and inhabitant of said State of Indiana. The amount in controversy in this suit, exclusive of interest and costs, is in excess of the sum of Two Thousand Dollars (\$2,000.00).

2. On or about the 21st day of May, A. D. 1906, pursuant to resolution of the Board of Directors of the said defendant, Indianapolis, Crawfordsville and Western Traction Company, the said defendant made, executed and delivered a certain trust deed wherein the Marion Trust Company of Indianapolis, Indiana, incorporated under the laws of the said State, was named as trustee under said trust deed or mortgage; that the said trust deed conveyed all the property of the said defendant, Indianapolis, Crawfordsville and Western Traction Company, that it then had or which it might thereafter acquire; that the said mortgage or trust deed secured an issue of three thousand (3,000) bonds of the denomination of One Thousand Dollars (\$1,000.00) each; that pursuant to the said mortgage or trust deed bonds of the said issue to the number of fifteen hundred (1500) were duly issued and delivered; that the remaining 1500 of the said bonds still remain in the hands of the said defendant, the said Traction Company, unissued; that the said fifteen hundred (1500) bonds first above mentioned, numbered from one (1) to fifteen hundred (1500) both inclusive, have been sold and delivered by the said Traction Company and are now held and owned by various persons; that your orator is the owner of about two hundred eight (208) of said bonds.

4 Your orator further shows that the bonds so sold and delivered bear interest at the rate of five per cent (5%) per annum and that said interest is payable on the first day of January and July in each year; that there will be due and payable the sum of Thirty-seven Thousand, Five hundred dollars (\$37,500.00) on the first day of July, to various persons, firms and corporations holding the interest coupons for the semi-annual interest upon the said

One Million, Five hundred thousand dollars (\$1,500,000) of the said bonds of the said defendant.

3. The said defendant and your orator on or about June 6, 1906, made and entered into a certain contract under and by which contract your orator agreed to perform certain work and deliver certain materials to and upon the railroad of the said defendant then in process of construction and extending from the City of Indianapolis in Marion County in and to the City of Crawfordsville, in the county of Montgomery in said State of Indiana. Your orator has performed all the work and delivered all the material provided to be performed and delivered by it under the said contract; that there is a balance due to your orator in the sum of about Thirty-seven hundred dollars (\$3700) which the said defendant has wholly failed to pay, although your orator has made frequent demands upon the said defendant to pay the same.

4. On or about May 3, 1909, one, W. A. Guthrie, recovered a judgment in the Court of Marion County, Indiana, for and in the sum of Two Thousand Dollars (\$2,000) against the said

5 defendant, the said Traction Company; that Allis-Chalmers Company, a corporation engaged in the manufacture and sale of electrical machinery and appliances, is asserting a mechanic's lien against the property of the said defendant and the amount of such lien as claimed by the said Allis-Chalmers Company and as your orator is advised is for and in the sum of Thirty-one thousand dollars (\$31,000); that the said Allis-Chalmers Company have given the proper notices under the statute and have filed the proper papers to enforce the said claim for lien; that they are now pressing the said claim for lien to a final determination.

Your orator further represents that the Moore-Mansfield Construction Company claims a mechanic's lien against the said property of the said defendant for and in the sum of Twenty-eight thousand dollars (\$28,000); that the said Moore-Mansfield Construction Company has given notice and filed papers under the statute and threaten to prosecute their said claims for mechanic's lien to a final determination.

Your orator further represents that under and by virtue of a certain trust agreement executed by the said defendant, the Indianapolis, Crawfordsville and Western Traction Company, and certain trustees therein named and various and sundry stockholders of the said defendant, the said defendant borrowed from various persons who were in general stockholders of the said defendant company the sum of ninety-seven thousand dollars (\$97,000); that the said indebtedness is evidenced by trust certificates issued by the trustees named under the said trust agreement; that the said trust certificates are obligations of the said defendant and are now due and wholly unpaid.

6 Your orator further represents that on or about July 1, 1907, the said defendant, the said Indianapolis, Crawfordsville and Western Traction Company, made, executed and delivered for valuable consideration various and sundry promissory notes aggregating the sum of seventy-four thousand dollars (\$74,000) to

become due and payable three (3) years thereafter, bearing interest at the rate of six per cent (6%) per annum; that no interest has been paid on the said notes; that the said defendant owes the sum of two thousand dollars (\$2,000), premiums for fire insurance; that the amount due for premiums upon fire insurance has remained unpaid for the period of one (1) year; that besides the indebtedness heretofore mentioned and alleged, the said defendant owes to various persons, firms and corporations various amounts of money aggregating the sum of approximately six thousand dollars (\$6,000).

Your orator further shows that there are various damage suits now pending against said defendant for personal injuries sustained by the plaintiffs in said suits; that the said causes are being pressed for trial and judgments may be obtained at any time against the said defendant for various amounts of money.

5. Your orator further represents that the said defendant is operating an electric or interurban railroad from the city of Indianapolis to and into the city of Crawfordsville in the State of Indiana, through and into the counties of Marion, Hendricks, Boone and Montgomery; that it has been operating the said railroad for many years; that cars are being run upon the said road carrying passengers and express packages and other freight, serving the public and providing for the convenience of persons desiring to travel between the said points or upon the said railroad and persons desiring to ship goods over and upon the said railroad of the said defendant.

6. The said defendant, Indianapolis, Crawfordsville and Western Traction Company, has no money with which to pay the interest falling due as heretofore alleged upon July 1, 1909; that default will be made in the payment of the interest upon the said fifteen hundred (1500) bonds issued and delivered as aforesaid; that the said defendant, Indianapolis, Crawfordsville and Western Traction Company, has no money with which to pay the indebtedness of ninety-five thousand dollars (\$95,000) evidenced by the trust certificates issued as aforesaid or the seventy-four thousand dollars (\$74,000) in notes made and delivered about the first day of July, A. D. 1907, or the judgment of W. A. Guthrie and the said defendant has no money or other funds with which to take care of or pay the mechanic's lien claims hereinbefore set forth and described, or any of the other indebtedness heretofore mentioned; that the said defendant, Indianapolis, Crawfordsville and Western Traction Company, is wholly insolvent and without funds to meet the obligations due or about to become due as aforesaid; that the said defendant is unable to raise any money wherewith to meet the said interest upon the said bonds falling due on July 1, 1909, or to meet the other obligations due or about to become due.

Your orator further represents unto your Honors that unless this Court, in view of the inability of the said defendant corporation to meet its due and maturing obligations, and in view of its inability to fully pay the interest indebtedness which will become due on July 1, 1909, and the other indebtedness that is now due, and the judgments and mechanic's lien claims, which

said mechanic's lien claims are a lien upon said property of the said defendant, will deal with this property as a single trust fund for the benefit of its creditors, your orator and the other creditors of the said defendant and the stockholders of the said defendant company will receive but a small portion of the money due them and have invested in the said defendant company; and the said defendant will be subject not only to judgments and executions in suits brought against it by its creditors, but will also be subject to attachments at the suit of said creditors; and that unless the assets of the said corporation are properly marshaled and protected by a receiver or receivers to be appointed for said corporation, it will be subject to vexatious and costly litigations in all the counties through which said railroad runs, its assets will be subject to attachments and executions as aforesaid and in the event of forced sales would bring very much less than their fair and reasonable value, all of which would be of great injury to your orator and other creditors and stockholders of said defendant corporation and to the public who use the said railroad, and the property will be dissipated to such an extent that its stockholders will realize little or nothing from their holdings of its stock; that the creditors of said corporation will be unable to collect their claims or any substantial part thereof against the said corporation and that the intervention of this Court is necessary for the protection of such stockholders and creditors of said corporation to the end that its property may not be dissipated by a multiplicity of suits brought against it in many different jurisdictions to the detriment of the interest of the creditors and stockholders thereof and of the public.

In consideration whereof and forasmuch as your orator is without adequate remedy without the assistance of this Honorable Court, where matters of this nature are properly cognizable and relievable, it files this bill of complaint and prays for equitable relief as follows:

First. That this court appoint a receiver or receivers of said defendant corporation with full power and authority to demand, sue for, collect, receive and take into possession all the lands, franchises, railways, goods, chattels, rights and credits, books, papers, choses in action and property of every description of said corporation held by it as owner or otherwise, with all the incidental powers ordinarily vested in receivers in such cases, with full power and authority to operate the railroad of the defendant now constructed and in operation.

Second. That the right of this complainant may be ascertained and that the rights of all other creditors of the said defendant, Indianapolis, Crawfordsville and Western Traction Company, may be ascertained and that the Court will fully administer the fund in which this complainant is interested, being the entire assets and income of said corporation, and ascertain the several and respective liens and priorities existing on each and every part thereof.

10 and decree and enforce the liens, rights and equities of all the creditors of the said defendant as the same may be finally ascertained upon interventions or applications of every such creditor or lienor.

Third. That in the event that the debts due to complainant and to the other creditors who may come forward and prove their claims, cannot be satisfied out of the income of said property and the sale of such portions thereof as can be sold without serious detriment to the value of the remainder, that the whole of the property of said corporation be sold or otherwise disposed of, in such manner as to the Court may seem to be most advantageous, and that the proceeds of such sale may be applied, first, to the satisfaction of the debts of the said defendant corporation in the due order of priority and the surplus, if any, distributed among the stockholders in such manner as the court may direct; and further that this complainant may have such further and other relief in the premises as the nature of the case may require and as may be agreeable to equity.

Fourth. And that a subpoena be granted, to be directed to the defendant, Indianapolis, Crawfordsville and Western Traction Company, requiring said defendant personally to appear before this Court and then and there full, true and direct answer make to all and singular the premises, but not under oath, an answer under oath being hereby waived, and further to perform and abide by such order, direction or decree as to the Court may seem meet.

ELECTRICAL INSTALLATION COMPANY.

By JAMES W. NOEL,

FYFFE & ADCOCK,

Solicitors for Complainant.

11 STATE OF ILLINOIS,
County of Cook, ss:

A. M. Hewes, being first duly sworn, deposes and says that he is the Secretary and Treasurer of the complainant; that the allegations of fact set forth in the foregoing bill of complaint are true to the best of deponent's knowledge, information and belief.

A. M. HEWES.

Subscribed and sworn to before me this 25th day of June, A. D. 1909.

[SEAL.]

OTTO R. BARNETT,
Notary Public.

12 And thereupon there issued out of the office of the clerk of said court a subpoena in chancery in the above entitled cause in the words following, to wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the Marshal of the District of Indiana, Greeting:

You are hereby commanded to summon the Indianapolis, Crawfordsville and Western Traction Company, Citizen and resident in

the State of Indiana, if it may be found in your District, to be and appear in the Circuit Court of the United States, for the District of Indiana, aforesaid, at Indianapolis, on the first Monday in August next, to answer a certain bill in Chancery filed and exhibited in said Court against it by the Electrical Installation Company, Citizen of and resident in the State of Illinois, Hereof it is not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness, Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of June, A. D. 1909, and in the one hundred and thirty third year of the Independence of the United States of America.

Attest:

[SEAL.]

NOBLE C. BUTLER, *Clerk*.

MEMORANDUM.—The said defendant is required to enter its appearance in this suit in the Clerk's Office of said Court, on or before the first Monday of August, 1909, otherwise the said bill may be taken pro confesso.

NOBLE C. BUTLER, *Clerk*.

13 And afterwards, towit: on the 28th day of June, 1909, said subpoena was returned into the office of the clerk of said court with the following return endorsed thereon, towit:

DISTRICT OF INDIANA:

I received this writ at Indianapolis, in said District, at 5 o'clock P. M., June 26th, 1909, and served the same as follows:

Upon the Indianapolis, Crawfordsville and Western Traction Company by reading to and in the hearing of and delivering a true copy of the writ to A. A. Barnes, President of said Company, at Indianapolis, Marion County, Indiana, this June 26th, 1909.

HENRY C. PETTIT,

U. S. Marshal,

By ALONZO BOYD, *Deputy*.

* * * * *

14-15 And afterwards, towit: at the May Term of said Court, on the 8th day of July, 1909, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, towit:

Comes now the defendant and files its petition for leave to file a cross-bill herein, and the court being sufficiently advised in the premises grants such leave, and said defendant now files its cross-bill herein in the words following, towit:

UNITED STATES OF AMERICA,
District of Indiana:

THE ELECTRICAL INSTALLATION COMPANY
 V.

THE INDIANAPOLIS, CRAWFORDSVILLE AND WESTERN TRACTION
 COMPANY.

To the Honorable the Judges of the United States Circuit Court in
 and for the District of Indiana, in Chancery Sitting:

The above named defendant, The Indianapolis, Crawfordsville
 and Western Traction Company, by leave of this Honorable Court
 first had and obtained, files this its cross bill herein, against the
 complainant herein and represents to this Honorable Court as fol-
 lows:

That this cross complainant is the owner and in possession of
 and is operating an interurban electric railway extending from the
 city of Indianapolis in the county of Marion in the State
 16 of Indiana to the city of Crawfordsville, in Montgomery
 county in the state of Indiana, passing through parts of the
 counties of Marion, Hendricks, Boone and Montgomery in the state
 of Indiana, and has been thus the owner and in the possession and
 operation of said interurban electric railroad since the 7th day of
 July, 1907, in the manner hereinafter set out.

That in the operation of said road passenger and freight cars
 are run over said line on stated and established schedules for the
 carrying of passengers and freights.

That this cross complainant heretofore, towit: on or about the
 21st day of May, 1906, having been thereunto authorized by its
 stockholders and directors executed its certain mortgage, wherein
 the Marion Trust Company of Indianapolis was named as trustee
 for holders of bonds to be issued thereunder, upon all of the prop-
 erty, rights and franchises, then owned or thereafter to be acquired,
 to secure an authorized issue of three thousand of its bonds, each
 of the par or face value of One thousand dollars, falling due thirty
 years from the date thereof; fifteen hundred of which bonds have
 been issued and sold to divers and sundry persons, the names of
 many of whom are at this time unknown to this cross complain-
 ant, all of which said fifteen hundred of said bonds are now out-
 standing; that said bonds bear interest at the rate of five per cent
 per annum, payable semi-annually on the first day of January
 and July in each year.

That the earnings of this cross complainant have not been suffi-
 17 cient to pay its current expenses and fixed charges, includ-
 ing interest.

This cross complainant further represents and shows to
 the court that the complainant in this suit was the contractor in
 the original construction of the road for doing the overhead work
 of such railroad, and for the furnishing of the electrical equipment
 thereof. That prior to the completion of said railway and before
 the work of operating the same began, towit: on the 27th day of
 March, 1907, the complainant and this cross complainant entered

into a certain written contract, wherein and whereby the complainant was given the right so to do, and it undertook to operate said railway, from the time of its completion until ninety days after the cross complainant gave said complainant written notice of the termination of said agreement.

That under and pursuant to the terms of said contract, the complainant entered upon the control and management of the operations of said road, and selected as its representative to conduct such operation one A. M. Hewes, and put him in charge of such operation and continued in the charge thereof until the 18th day of May, 1908, upon which date after such notice, complainant surrendered the operation thereof. That said Hewes had not prior thereto had practical experience in such work, and such management was inefficient, improvident and extravagant, and involved the cross complainant in such needless expense, and great liability on account of accidents arising out of carelessness and negligence in such operation of said railway.

That before the expiration of the operation of said railway by said complainant, a contract was entered into by and between
18 a large number of the stockholders in this corporation, cross complainant and bondholders of the bonds secured by said mortgage, including the complainant herein, wherein and whereby the direct control and management of the operation of said road was committed to five persons called Managing Trustees, names in said agreement, one of whom was said A. M. Hewes, nominated by the complainant to represent its interest; that by the terms of said agreement no action could be taken by said Managing Trustees, without the unanimous consent of all the members.

That after the execution of said agreement said Hewes has at all times continued as one of said Managing Trustees, and no step in the control and management of the operation of said road was taken without his consent. That under the terms of said agreement each of the subscribers undertook and agreed to make certain advancements to this cross complainant wherewith to pay its floating indebtedness; which contract was thereafter approved by the Board of Directors of this cross complainant so far as it had power or authority in the premises. And thenceforward said Managing Trustees have had the actual and direct control and management of the operation of said railway.

That under and pursuant to said agreement certain of said subscribers thereto did advance unto this cross complainant sums aggregating ninety three thousand five hundred sixty seven and 50/100 dollars, which constitute just liabilities against it.

That in addition thereto this cross complainant is justly indebted to divers other parties, stockholders of this cross complain-
19 ant corporation and holders of bonds secured by said mortgage, upon certain promissory notes falling due on the 1st day of July, 1910, by it executed to them for money borrowes to pay existing indebtedness aggregating the sum of sixty-seven thousand dollars; all of which together with interest thereon since Jan-

uary 1, 1908, are valid, existing obligations of this cross complainant.

This cross complainant further represents to the court, that the complainant herein asserts that there is due to it from this cross complainant under the contract between said parties for construction and equipment hereinbefore referred to, the sum of thirty seven hundred dollars, which indebtedness is denied by this cross-complainant.

The cross complainant further represents and shows to the court that the Allis Chalmers Company, a corporation organized and engaged in the manufacture and sale of electrical machinery and appliances, is asserting in a suit pending in the Superior Court of Marion County, a mechanic's lien against the property of this cross complainant for and on account of material furnished by it to the complainant for its use under the contract between the complainant and this cross complainant hereinbefore referred to, to the extent and amount of thirty-one thousand dollars, the validity of which asserted lien, and the amount of said alleged indebtedness are denied and disputed by this cross complainant.

And this cross complainant further represents and shows to the Court, that prior to the time when said Allis-Chalmers Company gave such notice of its intention to take and hold such mechanic's lien, it had paid and rendered to the complainant the entire compensation agreed to be paid by it to the complainant for the full performance of said contract, and that if there is any sum whatever due to said Allis-Chalmers Company, it is by reason of the fact that the complainant has failed to perform its contract with said Allis-Chalmers Company.

The cross complainant further represents and shows to the court that The Moore Mansfield Construction Company, a corporation which entered into a contract with this cross complainant for certain other work in the construction of said railway, has given notice of its intention to hold a mechanic's lien on the railway of this cross complainant, to secure an alleged indebtedness of twenty eight thousand dollars, and has brought suit to enforce the same in the Superior Court of Marion County in the State of Indiana. That the validity of said mechanic's lien is altogether denied and disputed by this cross complainant, and it also denies that it is indebted to said Moore-Mansfield Company in the sum named.

The cross complainant further represents and shows to your Honors, that a certain judgment has been recovered against it in the Circuit Court of Hancock County in the State of Indiana for the sum of two thousand dollars in favor of W. A. Guthrie, on which execution has been issued, and which said Guthrie is now threatening to have levied upon the cars of this cross complainant.

This cross complainant further represents and shows to your Honors, that it is indebted to divers and sundry other persons in sums aggregating about twenty thousand dollars.

And this cross complainant further represents and shows to the court that notwithstanding the facts hereinbefore set out, that the earnings arising out of the operation of its road are not sufficient for the time being to meet and discharge the expenses of such

operation, and to meet and pay the fixed charges of this cross complainant, including interest on said bonds secured by said mortgage, and upon the money borrowes as hereinbefore set out, to pay its floating indebtedness, yet this defendant had hoped that by securing a more efficient and economical management of said railway its expenses might be brought within such limits as that it might be enabled eventually to pay and discharge all its debts after the payment of operating expenses. That since the operation of said road has been taken from the complainant, a new and more efficient management has been instituted, whereby the expenditures have been materially lessened, and the income and earnings increased.

That in the hope of eventually paying and discharging such indebtedness, certain of the stockholders and bondholders and directors have from time to time endorsed and otherwise secured certain promissory notes executed by this cross complainant, on which it has borrowed money for the purpose of paying interest on such bonded indebtedness, on the last of which notes there now remains due about the sum of twelve thousand five hundred dollars.

And this cross complainant further represents and shows to your Honors, that the Managing Trustees and also the Board of Directors are in dispute and conflict as to the proper steps to be taken in the future management and control of the affairs of this cross complainant, and are unable to agree upon any plan for the future management and control of such affairs.

That heretofore, towit: on the 26th day of June, 1909, the complainant filed its original bill in this cause, praying for the appointment of a receiver herein, reference to which is hereby made as to its contents.

That this cross complainant verily believes and upon such belief avers, that the filing of said bill has necessarily so affected its credit, that no material or supplies can be purchased except for cash, to be paid upon delivery. That by reason of excessive rains within the territory traversed by the line of said railway and consequent high water in streams crossed by said railway, embankments and bridges therein have been put in such condition as to require extensive repairs to avoid danger to cars running over said line of railway, to make which will require the purchase of considerable quantities of material, and a large increase of its labor expense.

This cross complainant further represents and shows to the court that by reason of the filing of said original bill herein, all hope of the possibility of continuing the operation of said road, under the existing conditions of dispute and want of money among the Managing Trustees and Board of Directors has been destroyed.

That plans for the reorganization of the affairs of this cross complainant have been proposed by the representative of the complainant to the Managing Trustees, and to other persons creditors of this cross complainant, and because the other members thereof and other of said persons did not believe such plans were wise and prudent, and they therefore declined to adopt the same, said representative of complainant in such Board of Managing Trustees, has by virtue of the provisions of the agreement by which

such Managing Trustees must act unanimously, been able to prevent, and has prevented any steps being taken except such as are acceptable to the complainant, so that in fact the complainant has at all times been able to control, and has actually controlled the operation and management of the affairs of said road.

That since the filing of the original Bill in this cause, this cross complainant has been informed and verily believes, and upon such information and belief it represents to your Honors, one Guy M. Walker who has been acting with the complainant in proposing the scheme for reorganization of this cross complainant corporation, which was not acceptable to other persons interested and consulted, has for many days last passed, and at times prior to the filing of the original Bill of Complaint, been giving out and stating that a Receiver would be appointed for said railway, and that his brother would be attorney for such receiver; and when persons who have been solicited to subscribe to such plan of reorganization have declined so to do or have hesitated about so doing, he has threatened that unless they did so join in such proposed scheme of reorganization, a receiver would be appointed; and that since such Bill of Complaint was filed he has given out and stated, that if the receiver was appointed, it would not prevent said proposed scheme of reorganization being carried out, and that such bill was filed to prevent other persons from applying for the appointment of a receiver for said railway.

That by reason of the facts hereinbefore represented, this cross complainant verily believes that the interest of this cross-complainant, and all other persons interested in its assets, will be best subserved by the immediate appointment of some person wholly free from the control or influence of any of the parties to this litigation, or directly or indirectly affected thereby, and with practical experience in the operation and management of such railways, as receiver of the railway of this cross complainant, with instructions that he shall be wholly indifferent between the parties, and that he shall not employ any counsel or attorneys except upon the order of your Honors; that if any of the parties now parties or hereafter becoming parties to this action by leave of the court, shall desire any action of this court in the matter of such receivership, such party or parties shall by their several and respective counsel make application to your Honors for such action as they may desire.

And the said Receiver shall be given such instructions as may be necessary to preserve such railway in a safe condition for its proper operation. And such other or further orders as to your Honors may seem proper and necessary for the preservation of all and singular the rights of each and every person or party interested in the property and assets of this cross complainant.

In consideration whereof, and forasmuch as this cross complainant can have adequate relief in the premises only in this
25 Honorable Court, where matters of this nature are properly cognizable and relievable, it files this its cross bill against the complainant, and prays this Honorable Court at once to appoint

some competent and disinterested person Receiver of all the property, assets, rights and franchises of this cross complainant, and direct him to take immediate possession thereof, and to continue the operation of said railway, and to put the same in such repair as that it can be safely operated, under such orders and directions as the court may deem proper and necessary for the proper preservation and conservation thereof, for the benefit of all persons interested therein, according to their several and respective interests, until a sale thereof can be had, and a distribution of the proceeds thereof among all persons entitled to share therein according to their respective rights. That this Court shall according to its established procedure, make all such orders as may be necessary or requisite for the determination of all claims of every nature and description, asserted against this cross complainant, and for prescribing the order in which such payments shall be made.

That it shall by its proper orders direct said Receiver with all due diligence to take all necessary steps to put the line of its railway in such condition that cars may be safely operated over the same, and apply the cash on hand, and the earnings of said railway to that end, so far as may be found to be necessary. And if the moneys derived from these sources shall be found to be insufficient for that purposes, that such Receiver be directed to promptly report such fact to this court for its further orders in the premises.

And inasmuch as this cross complainant is advised and believes that The Marion Trust Company of Indianapolis, Trustee under the mortgage in the original complaint and herein mentioned and described, and the judgment creditor, and the parties claiming and asserting mechanics' liens, as in the original complaint and herein set forth, ought to be made parties to these proceedings, it prays that it may be authorized by proper amendment hereto to make all such persons parties defendant to this its cross bill, to the end that all their several and respective rights may be determined and protected.

And may it please your Honors to grant to this cross complainant a writ of subpoena of the United States of America issuing out of and under the seal of this Honorable Court, addressed to the said The Electrical Installation Company, and upon the amendment of this cross bill making such other parties defendants hereto, a like subpoena of the United States of America shall issue out of and under the seal of this Honorable Court, directed to said Allis-Chalmers Company, the said Moore Mansfield Company, The Marion Trust Company of Indianapolis, and the said W. A. Guthrie, defendants hereto, commanding them and each of them, on a day certain therein to be named and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and to stand to, perform and abide such further order, direction and decree as may be made against them or either of them.

27-29 And this cross complainant, as in duty bound will ever pray &c.

THE INDIANAPOLIS, CRAWFORDSVILLE
& WESTERN TRACTION COMPANY,
By SMITH, DUNCAN, HORN BROOK & SMITH,
Its Solicitors.

UNITED STATES OF AMERICA,
District of Indiana:

Albert A. Barnes being duly sworn on behalf of the cross complainant in the foregoing cross bill, says that he is the President of the cross complainant corporation, and is authorized to make this affidavit on its behalf.

That he has read said cross bill and knows the contents thereof and that said cross bill is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to these he believes it to be true.

ALBERT A. BARNES.

Subscribed and sworn to before me, this 7th day of July, 1909.
HENRY H. HORN BROOK, [SEAL.]
Notary Public.

My commission as Notary Public expires on the 19 day of May 1909.

* * * * *
29a-41 And afterwards, to-wit, at the May Term of said Court, on the 9th day of July, 1909, in recess of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the complainant by counsel, and by leave of court files its amendment to the bill of complaint herein, in the words following, to-wit:

And now comes the said complainant and pursuant to leave of court first had and obtained, does hereby amend its bill of complaint filed herein, as follows:—

1. By inserting in the first paragraph of page 1 in line two from the bottom of said paragraph and between the words "Company", and "and", the following: "W. A. Guthrie, Allis-Chalmers Company, Moore-Mansfield Construction Company, Marion Trust Company, Trustee,"

2. In the last paragraph of said bill of complaint in the third line from the top of said paragraph, between the words "Company" and "Requiring," the following: "W. A. Guthrie, Allis-Chalmers Company, Moore-Mansfield Construction Company, Marion Trust Company, Trustee."

ELECTRICAL INSTALLATION COMPANY,
By FYFFE & ADCOCK, AND
JAMES W. NOEL,
Solicitors for Complainant.

* * * * *

42 And afterwards, to-wit, at the May Term of said Court, on the 22nd day of October, 1909, before the Honorable Albert B. Anderson, Judge of said Court the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company by W. A. Ketcham, Esq., its solicitors, and enters its appearance to the bill of complaint and cross-bill herein.

43 And afterwards, to-wit, at the November Term of said Court, on the 6th day of December, 1909, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company by William A. Ketcham, Esq., its solicitor and files its answer to the bill of complaint herein, in the words following, to-wit:

This defendant, the Moore-Mansfield Construction Company, now ajd at all times hereafter, saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, answering says:

1. It admits that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois and that the defendant, the Indianapolis, Crawfordsville & Western Traction Company is a corporation organized and existing under and by virtue of the laws of the State of Indiana and that the amount in controversy in the suit exclusive of interests and costs, exceeds the sum of Two Thousand (\$2000) Dollars.

2. This defendant admits that pursuant to the resolution of the Board of Directors of the defendant the Traction Company, said defendant executed its certain trust deed to the Marion Trust Company, conveying its property, which it then had or which it might hereafter acquire, to secure an issue of three thousand (3000) bonds of the denomination of One Thousand (\$1000) Dollars each; that fifteen hundred (1500) of said bonds have been issued and fifteen hundred (1500) remain unissued; and that by virtue thereof

44 the holders of said bonds have a lien upon the body of the railroad property of the defendant the Traction Company but plaintiff avers that the lien of such trust deed and bonds secured thereby, is junior and subordinate to the lien of this defendant, as more particularly set forth in its cross-bill filed herein, to which defendant refers for greater certainty.

3. That on or about June 6th the plaintiff entered into a contract with the Traction Company for certain work and *and* materials on the line of the road of said Traction Company between the City of Indianapolis and the City of Crawfordsville but whether the plaintiff has performed all the work and delivered all the material or there is a balance as averred in favor of plaintiff of Thirty-seven hundred (\$3700) Dollars, this defendant has no information sufficient to enable it to form a belief, and whether there is or is not anything due the plaintiff, such amount constitutes no lien upon the corpus of the property of the Traction Company and if it does, it is junior and

subordinate to the lien of this defendant, as more specifically shown in this defendant's cross-bill, to which this defendant refers for greater certainty.

4. That at the time named, the defendant Guthrie recovered a judgment against the Traction Company for an amount of about Two Thousand (\$2000) Dollars which still remains unpaid, but this defendant avers that the lien of said Guthrie, if any it have, is junior and subordinate to the lien of this defendant as set forth in its cross-bill filed herein, to which this defendant refers for greater certainty on that behalf.

5. This defendant admits that the Allis-Chalmers Company is asserting a mechanic's lien against the property of the Traction company in an amount of, to-wit: Thirty-one Thousand (\$31,000)

dollars. Defendant admits that whatever amount is due to said Allis-Chalmers is secured by a mechanic's lien upon the railroad property of the defendant the Traction Company but defendant has no sufficient information to form a belief as to the amount that remains due and unpaid and it avers that the lien of said Allis-Chalmers Company is concurrent and co-extensive with the lien of this defendant upon said railroad property, as hereafter in this answer and in the cross-bill filed in this cause, more specifically set forth.

6. It admits that it claims a mechanic's lien against the property of the defendant the Traction Company in the sum of, to-wit: Twenty-eight thousand eighteen and seventy-five hundredths (\$28,018.75) Dollars with interest from the 7th day of September, 1907, and its reasonable attorney's fees for and on account of materials furnished and caused to be furnished and work and labor done and performed and caused to be done and performed by this defendant in the erection and construction of the railroad of the defendant the Traction Company all of which will more fully and at large appear by reference to the cross-bill filed in this cause by this defendant against the complainant and the other defendants hereto.

7. This defendant says that it has no sufficient information upon the subject of the issuing of certain trust certificates, aggregating Ninety-seven thousand (\$97,000) Dollars under the trust agreement alleged in the bill, to enable it to have a belief on that subject, but asks that in due time the complainant or the parties in interest may be required to make proper proof on that subject.

8. Defendant admits the issuing of certain notes aggregating Seventy-four Thousand (\$74,000) Dollars, as averred in the bill, and that the same are unpaid.

46 9. As to whether the defendant, the Traction Company, owes the sum of Two Thousand (\$2000) Dollars for fire insurance or any other sum or that it owes various other persons amounts approximately aggregating Six Thousand (\$6000) Dollars or that there are damage suits pending against the Traction Company, this defendant has no sufficient knowledge to enable it to form a belief, and therefore asks that in due time proper proof upon those matters may be required.

10. The defendant admits that the Traction Company is operating

an electric interurban railroad extending from the City of Indianapolis to the City of Crawfordsville and it has been engaged in so operating said road for a great many years and is a common carrier engaged in carrying passengers and freight for hire.

11. The defendant admits that the Traction Company has no moneys with which to pay the interest upon its bonded indebtedness. As to whether it has the money with which to pay the interests upon the trust certificates or the outstanding notes or the judgment in favor of said Guthrie defendant has no specific information but is informed and cerily believes that said Traction Company is insolvent and without funds to meet the obligations due or about to become due and that it is unable to raise the money wherewith to pay said interest or its other obligations and that it was entirely proper that this Honorable Court should appoint a receiver for the property and assets of the defendant the Traction Company and that it should administer the same and ascertain and adjust, decree and enforce the lien, rights and equities of all the creditors of the defendant Traction Company including that of this defendant; and that upon the extent of the amount of the liens being ascertained, unless said indebtedness be otherwise paid, that said railroad property be sold to pay and discharge the liens in the order of their priority and that the residue of the proceeds of said sale be distributed among
47 its general and unsecured creditors, as the court may in due time ascertain and determine.

And this defendant denies all and all manner of unlawful conduct wherewith it is by the said bill charged; without this, there is any other matter, cause or thing in said complainant's said bill of complaint contained material or necessary for this defendant to make answer to, and *not* herein and hereby well and sufficiently answered, confessed, traversed, avoided and denied, is true, to the knowledge or belief of this defendant all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismisses, with his reasonable costs and charges in this behalf most wrongfully sustained.

CARSON AND THOMPSON AND
WILLIAM A. KETCHAM,
Solicitors for Defendant,
Moore-Mansfield Construction Co.

48 And at the same time said Moore-Mansfield Construction Company by its solicitor, files its answer to the cross-bill of the Indianapolis, Crawfordsville & Western Traction Company, in the words following, to-wit:

Separate Answer of the Defendant the Moore-Mansfield Construction Company to the Cross-bill of the Indianapolis, Crawfordsville and Western Traction Company.

This defendant, the Moore-Mansfield Construction Company, now and at all times hereafter, saving to itself all and all manner of

benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto answering says:

1. It admits that the cross-plaintiff is the owner and, subject to the possession by the receiver appointed by this Honorable Court, is in possession of an interurban electric railway line extending from the City of Indianapolis to the City of Crawfordsville; that it was in the possession and operation of said road since the 7th day of July, 1907, until the appointment of the receiver herein, since which time it has not been in such possession; and that in the operation of said road passenger and freight cars are run over said line for the carrying of passengers and freights.

2. That on or about the 21st day of May, 1906, said cross-plaintiff being thereunto authorized by its stock-holders and directors, executed a certain mortgage to the said defendant, the Marion Trust Company, Trustee, for the holders of certain bonds, said mortgage covering all the property, rights and franchises then owned or thereafter to be acquired, to secure an authorized issue of

49 three thousand (3,000) bonds of One Thousand (\$1,000) Dollars each, of which fifteen hundred (1500) bonds had been issued and sold, the bonds bearing interest at the rate of five per cent (5%) per annum; and that thereby the holders of said bonds issued, maintain and hold a lien upon the property of said railroad, which said lien, however, was, as appears from the cross-bill of this defendant filed in this cause, junior and subordinate to the lien of this defendant as set forth in said cross-bill, to which this defendant refers for greater certainty and precision.

3. Defendant admits that the earnings of said Traction Company have not been sufficient to pay its current operating expenses and fixed charges.

4. This defendant admits that the Installation Company was the contractor for doing certain work in the construction of said road and that certain right of operating the road by the Installation Company for the time named in the cross-bill was conferred upon it and that said Installation Company entered upon the control and management of said road and so continued until about the 18th day of May, 1908, and that said management was not a proper management, and upon notice the operation of the road was surrendered to the cross-plaintiff.

5. That prior to the expiration of the operation of said railway by said Installation Company a contract was entered into between a large number of the stock-holders of the corporation, its bond-holders, including the Installation Company and the Traction Company whereby the control and management of the operation of said road was committed to five persons called Managing Trustees, as alleged in said cross-bill, and that after the execution of said agreement the said Hewes was the Secretary and Treasurer and was continued as one of said Managing Trustees and that no steps

50 were taken in the control and management of the operation of said road without his consent; that under the terms of said agreement the subscribers thereto undertook to make certain

advancements to the Traction Company wherewith to pay its floating indebtedness, which contract was approved by the Board of Directors of said Traction Company so far as it had power so to do, and that thereafter Managing Trustees have had the actual and direct control, management and operation of said railway; and that thereunder certain of the subscribers did advance to said Traction Company the sum of, to wit: Ninety-three Thousand Five Hundred Sixty-seven and fifty hundredths (\$93,567.50) Dollars which constituted and constitutes a just liability against said Traction Company.

6. That in addition to said sum said Traction Company is indebted to divers other parties as and for the sum of Sixty-seven Thousand (\$67,000) Dollars for money loaned to it by said parties, and that the same constitutes a valid and existing but unsecured obligation of said Traction Company.

7. Defendant admits that the Installation Company assert that there is due to it from the Traction Company under the contract between said parties the sum of, to-wit: Thirty-Seven Hundred (\$3,700) Dollars but whether said claim is a valid and subsisting claim this defendant has not sufficient information to cause a belief and asks that proof thereof shall in due time be made but says that even if said indebtedness is justly due and owing it is an unsecured claim and is subject to the lien of this defendant as set forth in its cross-bill filed herein, to which this defendant refers.

8. The defendant admits that the Allis-Chalmers Company is asserting in a suit now pending in the Superior Court of Marion County a mechanic's lien against the property of the Traction Company for and on account of material furnished by it to the

51 Installation Company for use under its contract between the Installation Company and the Traction Company, and defendant admits that the same is a valid and subsisting lien upon the railroad of the Traction Company, but as to the extent and amount of said lien defendant has not sufficient information to form a belief and asks that the said Allis-Chalmers Company be required to make proof thereof. As to whether prior to the time when said Allis-Chalmers Company gave notice of its intention to take and hold such lien the Traction Company had paid and rendered to the Installation Company entire consideration agreed to be paid to said Installation Company for the full performance of said contract, or whether, if there is any sum due, it is by reason of the fact that the Installation Company had failed to perform its contract with said Allis-Chalmers Company, this defendant has no sufficient information to justify a belief and asks that proof thereof may be in due time required.

9. Defendant admits that it has given notice of its intention to hold a mechanic's lien on the railway property of said Traction Company and has brought suit to enforce the same in the Superior Court of Marion County in the State of Indiana for the sum of Twenty-eight Thousand eighteen and seventy-five hundredths (\$28,018.75) dollars with interest from the 7th day of September, 1907, and its attorney's fees. It admits that said Traction Com-

pany denies and disputes the validity of said lien, but defendant avers that it has a valid and subsisting lien for the amount of Twenty-eight Thousand and eighteen and seventy-five hundredths (\$28,018.75) dollars with interest from the 7th day of September, 1907, and its attorney's fees in that behalf, and defendant refers to its cross-bill in that behalf filed in this action for greater certainty.

52 10. Defendant admits that the defendant Guthrie has recovered a judgment in the Circuit Court of Hancock County for an amount in the neighborhood of Two Thousand (\$2000) Dollars but that said judgment is unpaid but defendant says that said judgment is junior and subordinate, if a lien at all, to the lien of this defendant, as set forth in its cross-bill.

11. Defendant has no information sufficient to justify it in forming a belief as to the extent of the other indebtedness of the defendant the Traction Company and asks that proof thereof may be at the proper time and in proper form required, and whatever said indebtedness is, defendant avers that it is unsecured and junior and subordinate to the lien of this defendant, as set forth in its cross-bill.

12. Defendant has no sufficient knowledge of the extent of the earnings and expenses together with the fixed charges of the Traction Company and its inability to discharge its floating indebtedness, but it admits that said railroad company is insolvent and a proper subject for the appointment of a receiver.

13. As to whether certain of the stock-holders and bond-holders and directors of the Traction Company have from time to time endorsed and otherwise secured certain promissory notes of the Traction Company on which money has been borrowed, defendant has no sufficient information to justify it in forming a belief, and it asks at the proper time proof thereof may be required.

14. As to whether the Managing Trustees of said Company or its Board of Directors are in dispute and conflict as to the proper steps to be taken in the management and control of the affairs of the Traction Company, whether they are unable to agree in regard to the future management and control of such affairs, defendant
53 has no knowledge sufficient to justify it in forming a belief, and it asks, therefore, that proof on that subject may in due time be required.

Plaintiff is not advised sufficiently to enable it to form a belief as to whether the filing of the bill of complaint in this action so affected the credit of the Company that no material or supplies could be purchased except for cash, to be paid upon delivery, or that by reason of excessive rains the line of said road has become so impaired as to require extensive repairs, but defendant believes that the credit of said road has long been impaired and that the filing of the bill of complaint in no wise added to the impairment of the credit of the Traction Company.

15. That as to the various plans for the re-organization of the affairs of the Traction Company or the transactions of said Walker,

defendant has no knowledge sufficient to justify it in forming a belief and so far as material, defendant respectfully asks that proof thereof shall in due time be required to be made.

16. Defendant admits that it was eminently proper that a receiver should be appointed for the operation of said road under the orders of this court and this defendant assents thereto, but this defendant respectfully submits that the appointment of said receiver and his operation of said railroad property ought not to be construed as in any wise affecting or impairing the lien of this defendant, as set forth in its cross-bill filed herein, to which this defendant refers for greater certainty and precision.

And this defendant denies all and all manner of unlawful conduct wherewith he is by the said bill charged; without this, there is any other matter, cause or thing in said complainant's said bill of complaint contained material or necessary for this defendant to make answer to, and not here and hereby well and sufficiently answered, confessed, traversed, avoided and denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

CARSON AND THOMPSON AND
WILLIAM A. KETCHAM,

*Solicitors for Defendant,
The Moore-Mansfield Construction Company.*

55 And at the same time on said 6th day of December, 1909, said Moore-Mansfield Construction Company by its solicitor, files its petition for leave to file a cross-bill against the complainant and the defendants herein, which petition is in the words following, to-wit:

DISTRICT OF INDIANA:

Petition by Defendant the Moore-Mansfield Construction Company for Leave to File a Cross-Bill Against the Complainant and the Defendants, the Indianapolis, Crawfordsville & Western Traction Company, the Marion Trust Company, Trustee; the Allis-Chalmers Company, and William A. Guthrie.

To the Honorable the Judges of said Court:

The defendant the Moore-Mansfield Construction Company respectfully shows to your Honors:

That long prior to the filing of the bill of complaint, herein, and the amendments thereto and the filing of the cross-bill of the Indianapolis, Crawfordsville & Western Company, to-wit: on the 25th day of August 1908 it duly filed in the Superior Court of Marion its certain complaint,—more particularly described in the cross-bill herewith tendered,—against the said Traction Company and the

Marion Trust Company Trustee, to which the defendant the Allis-Chalmers Company was admitted as a party defendant and filed its answer and cross-complaint, seeking to enforce a mechanic's lien upon the Traction Company; for the sale of said railroad property and that the lien of said Marion Trust Company Trustee be decreed to be junior and subordinate to the lien of your orator; which said suit still remains pending and undisposed of in said Superior Court.

2. That at the time of the filing of said complaint, there existed no such diverse citizenship between the parties and no federal question by reason whereof your orator might have filed the
56 same in this Honorable Court.

3. That a Federal question, to-wit: one arising under the constitution and laws of the United States, was for the first time presented on the 18th day of February, 1909, when the Supreme Court of Indiana handed down its opinion in the case of Indianapolis Northern Traction Company vs. Brennan et al. No. 21010, when the contract right of your orator, as it then and theretofore had existed, was impaired contrary to the requirements of the Constitution of the United States forbidding to any State the right to impair the obligation of a contract.

4. That for the first time, on to-wit: the 9th day of July, 1909, when by amendments to the bill and its order appointing a Receiver, this Honorable Court took jurisdiction and through its Receiver possession of the property and assets of said Traction Company was your orator so situated that it might intervene in this action for the protection and enforcement of its lien.

5. That it would be manifestly inequitable for this Court to take jurisdiction of said action and of said property and the possession thereof, and so exclude and deny to your orator the right to proceed with its litigation, so pending at the time of the filing of the bill herein and of said amendments to a complete determination of said matter unless your Honors should permit your orator to intervene in this case and afford to it the opportunity by means of a cross-bill of litigating its rights and equities in this suit as an extension and continuation of the suit so heretofore brought and now still pending in said Superior Court of Marion County as though the same had been duly and timely filed in this Honorable Court.

Your Petitioner, the Moore-Mansfield Construction Company now tenders this its cross-bill against the complainant and the defendants the Indianapolis, Crawfordsville & Western Traction, the Allis-Chalmers Company and William A. Guthrie, and prays that it may
57 be permitted to file the same and to prosecute the same as a continuation and extension of the litigation now pending in the Superior Court of Marion County in Room No. 4 thereof in said cause No. 76707 as though the same had been originally filed herein on said 25th day of August, 1908.

If for any reason your Honors should feel unwilling to permit the same, your orator prays that it may have leave to prosecute said action so pending in said Superior Court to final decree and sale as

directed by the Statutes of the State of Indiana in such cases made and provided. And your petitioner will ever pray, etc.

CARSON AND THOMPSON &
WILLIAM A. KETCHAM,

*Solicitors for said Defendant,
The Moore-Mansfield Construction Company.*

Henry A. Mansfield being first duly sworn, on his oath states that he is the President of the above-named defendant the Moore-Mansfield Construction Company; that he has read the above and foregoing petition and that the matters and facts therein stated are true, and further affiant saith not.

HENRY A. MANSFIELD.

Subscribed and sworn to before me the undersigned, a Notary Public, within and for Marion County, Indiana, this 4th day of December, 1909. Witness my hand and notarial seal.

[SEAL.]

WILLIAM J. CONDREY,
Notary Public.

My commission expires Aug. 2, 1913.

And the Court being sufficiently advised grants the prayer of said petition and said cross-bill is now filed by leave of court, and is in the words following, to-wit:

58 U. S. OF AMERICA,
District of Indiana:

In the Circuit Court of the U. S. Within and for said District, November Term, 1909.

No. 10961, Chancery.

THE ELECTRICAL INSTALLATION COMPANY

vs.

THE INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY et al.

Separate Cross-bill of the Defendant and Cross-plaintiff, The Moore-Mansfield Construction Company.

To the Honorable the Judges of said Court:

The above named defendant and cross-complainant, the Moore-Mansfield Construction Company, hereinafter for brevity's sake called the Construction Company, by leave of this Honorable Court first had and obtained, files this its cross-bill herein against the complainant, the Electrical Installation Company and the defendants, the Indianapolis, Crawfordsville & Western Traction Company, William A. Guthrie, The Allis-Chalmers Company and the Marion Trust Company, Trustee, each of whom are hereby made defendants to this cross-complainant's cross-bill, and thereupon your orator shows:

1. That it is a corporation organized and existing under and by virtue of the laws of the State of Indiana, as are also the defendants the Indianapolis, Crawfordsville & Western Traction Company, hereinafter for brevity's sake designated the Traction Company, and the Marion Trust Company, hereinafter for brevity's sake designated as the Trustees; the Electrical Installation Company hereinafter for brevity's sake called the Installation Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois; and the Allis-Chalmers Company is a corporation organized and existing under and by virtue of the laws of the

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State of New Jersey.

2. That heretofore, to-wit: on the 21st day of February, 1906, the defendant the Traction Company being the owner of certain franchises, rights of way and real estates situated and located in the Counties of Marion, Hendricks, Boone and Montgomery, in the State of Indiana, and being desirous of constructing thereon a certain interurban traction line extending from the City of Indianapolis to the City of Crawfordsville through a portion of said counties of Marion, Hendricks, Boone and Montgomery, entered into a certain contract in writing with this cross-complainant, a copy of which designated as Exhibit "A" is filed herewith and hereof made a part, whereby this cross-complaint undertook upon the consideration therein recited to furnish all the materials, machinery, equipment, labor, etc. and to equip and put into operation upon said right of way according to the plans and specifications to be furnished by said Traction Company that portion of its interurban railroad extending from the City of Indianapolis to the City of Crawfordsville, to be completed to the acceptance of the Engineer and the Executive Committee of the Board of Directors of said Traction Company according to the terms and conditions of said written contract. And said defendant Company on its part, in consideration of such creation and construction, undertook and agreed to pay to said plaintiff a sum equal to the cost thereof plus twelve and one-half per cent. (12½%) of such cost, the same to be computed on all pay-rolls, cost of machinery, supplies, equipments, buildings, insurance and all other charges paid through said plaintiff incident to the completion of said line except that no commission should be paid on One Hundred Eighty-seven Thousand (\$187,000) Dollars of bounds and Three Hundred Seventy-five Thousand (\$375,000) Dollars of stock to be delivered to the Consolidated Traction Company in payment for the right of way grade as then located and constructed nor for the materials on hand nor for the personal time of the officers of the Construction Company.

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3. That thereafter, to-wit: on the 6th day of June, 1906, the Traction Company with the knowledge and assent of your orator entered into a contract with the Installation Company that it, the Installation Company, should do all the work and furnish all the materials for the construction and equipment of the pole line over-head electrical circuit, power house and substation buildings and machinery, repair shop and rolling-stock for a single track and turn-outs electric railway to be built from Indianapolis to

Crawfordsville for said Traction Company, and thereby your orator was relieved from the performance of any of the work so undertaken to be performed by the Installation Company and to that extent the contract, being Exhibit "A," was modified and your orator relieved from the performance of any of the work so contracted and agreed to be performed by the Installation Company and thenceforth and thereafter all of the work to be performed by the Installation Company was separate and distinct from the work to be performed by your orator, and your orator was no longer under obligations to perform any of the work or furnish any of the materials so undertaken and agreed to be furnished and performed by said Installation Company.

4. And your orator and cross-plaintiff says that thereupon it entered upon the construction of said work and fully completed the same at an aggregate cost of Five Hundred Sixteen Thousand Seven Hundred thirty-three and thirty-four hundredths — (\$516,733.34) including the twelve and one-half per cent. commission, a bill of particulars of which designated as Exhibit "B" is filed herewith and hereof made a part, upon which said defendant the Traction Company from time to time paid to your orator upon the estimates of its Engineer sums aggregating Four Hundred Eighty-eight Thousand Seven Hundred Fourteen and fifty-nine hundredths (\$488,714.59) dollars, leaving due and unpaid from and after the 7th day of Sept. 1907, the date when the last material was furnished and work was done under said contract upon said line of railroad, the sum of Twenty-eight Thousand Eighteen and seventy-five hundredths — (\$28,018.75) which said amount has been due and unpaid from and after the 7th day of September, 1907, when said line was completed and accepted by said defendant the Traction Company in accordance with said contract, and there thereupon accrued to your orator a right of action to have and recover from said defendant said balance of Twenty-eight Thousand eighteen and seventy-five hundredths (\$28,018.75) Dollars, which includes the 12½% commission upon the entire cost of said work with interest thereon from said 7th day of September, 1907, which said sum now remains due and wholly unpaid, although said defendant the Traction Company has been often thereunto requested.

5. Plaintiff says that it in all respects fully complied with said agreement except that subsequent to the execution of said original contract by consent of your orator, the Traction Company and said Installation Company, a certain portion of said work was by said Traction Company sub-let to said Installation Company, as hereinbefore averred, but no portion of the work so sub-let being included in the amount due your orator. And your orator says that upon the completion of said work it furnished to the Engineer of the Traction Company evidence satisfactory to him that the work covered by said contract was free and clear from all liens for labor or material and that no claim then existed against said property, for which any lien might or could be enforced, arising through or under the contract with your orator, save and excepting the lien in favor of your orator, as hereinafter set forth.

Your orator further shows that before filing its suit, as herein-after set forth, it executed under its hand and seal to said Traction Company a release and discharge from any and all such claims and demands for and in respect to all matters and things growing out of or connected with said contract or the subject matter thereof, and of and from all claims and demands whatsoever, and then and there offered to surrender and deliver said release and discharge to said Traction Company, and then and there demanded that said Traction Company should make payment of said amount so due to it, and offered on such payment to surrender and deliver said release and discharge to said Traction Company but said Traction Company on such demand wholly failed, neglected and refused to pay said amount due or any sum and refused to accept the surrender and

62 delivery of said lease unless the same should be delivered to it unconditionally, notwithstanding its refusal to pay the amount then due and owing by it. Your orator has ever since been willing and now offers to execute and deliver to said defendant the Traction Company said release so tendered, or any other release or discharge that may be required by said Traction Company as a condition precedent to the payment of said indebtedness upon the payment of the moneys due to your orator, and offers to make and deliver in this action any paper or instrument in writing, releasing and discharging said defendant, the Traction Company that said defendant the Traction Company may desire, whenever and as the amount so due to your orator shall be paid to it.

6. Your orator further avers and charges that thereafter, to-wit: on the 7th day of September, 1907, being desirous of acquiring, maintaining and enforcing a mechanic's lien upon said railroad, right of way, bridges, trestles, tracks, ties and all other railroad property of said defendant the Traction Company for said work and labor so done and performed by it and caused to be done and performed, it executed and filed in the offices of the Recorders of Marion, Hendricks, Boone and Montgomery Counties on said date, its notice of intention to hold a mechanic's lien upon said premises, a copy of which designated as Exhibit "C" is filed herewith and hereof made a part, the same having being filed with said Recorders within sixty days from the completion of its said work and within less than one year from the time of the original filing of the complaint in the Superior Court of Marion County, Indiana, as herein-after set forth, and your orator caused said several notices to be recorded in the offices of the Recorders of said several counties respectively as follows: In Marion County, in Miscellaneous Record Book 54 at page 249; in Boone County in Miscellaneous Record Book 14 at page 486; in Montgomery County in Miscellaneous Record Book 8 at page 11; in Hendricks County in Miscellaneous Record Book 7, page 519.

7. Your orator further shows that the work and labor so done and performed by it and caused and procured to be done and
63 performed, and the materials so furnished and caused and procured by it to be furnished in the erection and construction of said railroad, were and are reasonably worth and were and

are of the value of Five Hundred Sixteen Thousand Seven Hundred Thirty-three and thirty-four hundredths (\$516,733.34) Dollars.

8. Your orator further avers that a reasonable attorney's fee for the enforcement of said mechanic's lien upon said property is Five Thousand (\$5,000) Dollars.

9. Your orator further avers that thereafter, to-wit: on the 25th day of August, 1908, and within less than one year from the time of the filing of said notice of its intention to hold said mechanic's lien, being desirous of enforcing its mechanic's lien, it filed its certain complaint in the Superior Court of Marion County, Indiana, against the defendant the Traction Company and the Trust Company, Trustees, asking for an enforcement of its said mechanic's lien, to which action the defendant the Allis-Chalmers Company upon its own motion was made a party defendant and in which it filed its answer to the complaint by said plaintiff for the enforcement of its lien and also its cross-complaint, seeking to enforce a mechanic's lien which it then and there claimed to have upon the said property for the work and labor performed and materials furnished by it in the erection and construction of said railroad, which said action upon the complaint of your orator and on the answer and cross-complaint of said Allis-Chalmers Company has ever since remained and is still pending and undisposed of in said Superior Court of Marion County, Indiana, being designated as Cause No. 76,707 in Room No. 4 of said Superior Court, and your orator and said Allis-Chalmers Company have ever since maintained and insisted upon their right to enforce their mechanic's lien upon said property and that their said lien was senior and paramount to the lien in favor of the Marion Trust Company, Trustee, or the holders of the bonds issued thereunder and secured by said trust deed.

10. Your orator further avers that at the time of filing its said complaint in the Supreme Court of Marion County, it being a citizen of the State of Indiana, as were also the Traction
64 Company and the Trustee notwithstanding the amount in controversy, exclusive of interest and costs, was largely in excess of Two Thousand (\$2,000) Dollars, was not authorized to and had no right to apply to this Honorable Court for relief in the premises, there being no diverse citizenship, nor at the time of the filing of said complaint nor long after, to-wit: until the 18th day of February, 1909, and long after the time had expired within which your orator might file its complaint for the enforcement of its mechanic's lien, was there any Federal question existing between your orator and the defendants hereto or any or either of them by reason whereof your orator might have applied to this Court for relief in the premises.

Your orator further shows that at the time of the filing of said complaint the defendant Guthrie had not obtained judgment against said Traction Company and had no lien or claim of any kind save an open and unsecured claim against said Traction Company and he was therefore not made a party defendant to your orator's suit in said Superior Court but having subsequently obtained a judgment against said Traction Company, if he acquired a lien upon the prop-

erty of said Traction Company, said lien was subordinate to and he became bound by the litigation that was pending at the time of the rendition of the judgment in his favor.

11. Your orator further avers and shows that at and prior to the time of the execution of said contract and of its entering upon the completion of said work and during the entire period while said work and labor were being done and performed and caused to be done and performed, it was and had been the settled law of the State of Indiana from the 17th day of February, 1838 down to and including the 17th day of February, 1909, a period of 71 years, that any contractor or subcontractor performing or causing to be performed work or furnishing or causing to be furnished materials upon any building or structure in the State of Indiana could, by complying with the mechanic's lien laws of the State then existing, maintain and enforce a mechanic's lien for the work and materials so furnished and performed, all in accordance with the Statutes of the

65 State in such cases made and provided. That from and after the 10th day of March, 1873, any person, whether contractor, sub-contractor, laborer, material or supply man, was accorded by the Statutes of the State of Indiana a similar right to a mechanic's lien upon all railroad property to and for which it had furnished and caused to be furnished materials and on which it had performed or caused to be performed labor, all in accordance with said Act of March 10, 1873. And it had become and was the settled policy and law of the State of Indiana as construed by all of its courts, whether those of last resort or the nisi prius courts, that said right to take and enforce a mechanic's lien for materials furnished and work and labor performed, existed in favor of contractors and sub-contractors as well as laborers, material and supply men; all of which your orator at and prior to the time of the execution of said contract and during the time while said materials were being furnished and said work and labor was being performed had full knowledge, and your orator relied thereon and but for the rights so guaranteed to him by the Statutes of the State to take, maintain and enforce a mechanic's lien for the work and labor that he might perform or cause to be performed or the materials that he might furnished or cause to be furnished, your orator would not have executed said contract or have undertaken to furnish said materials or any of them or perform said work or labor or cause the same to be performed, your orator then and there well knowing that unless it had and there should be preserved to it the right to take and enforce a mechanic's lien upon said railroad for the amounts that might become due it for such work and labor done and performed and caused to be done and performed and materials furnished and caused to be furnished, would be wholly lost to it by reason of the inability of the defendant the Traction Company to pay for the same. And your orator especially knew that unless it had and would be authorized to enforce a mechanic's lien upon said railroad property senior and paramount to the bonded indebtedness which your orator knew was about to be created in order to furnish the funds in part at least with which to pay for said work and labor done and performed and materials furnished and caused

to be furnished, the lien of said mortgaged bonds would be senior and paramount to any claim of your orator and your orator would be remediless in the premises.

66 And your orator shows that the various Statutes enacted by the State of Indiana conferring the right to enforce mechanics liens, together with the construction thereof by the Supreme and Appellate Courts of the State, and the titles thereof were as follows, that is to say:

a. The Act of February 17, 1838, under the title: "An Act giving to mechanics a lien upon buildings" Revised Statutes of 1838 page 412.

b. The Act of February 13, 1843 under the title of: "of the liens of mechanics and others on buildings" Revised Statutes of 1843 page 776, Chapter 42, Article 1.

c. The Act of June 18, 1852 under the title of: "An Act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the Courts of this State—to abolish distinct forms of action at law and to provide for the administration of justice in a uniform mode of pleading and practice without distinction between law and equity" in which Act under the sub-head "Article XXXVI. To enforce mechanics' liens on buildings," Revised Statutes of 1852, Volume 2, page 181.

d. The Act of March 10, 1873, under the title of: "An Act to give security to persons who contract with railroad corporations" Acts of 1873 page 187.

e. The Act of March 6, 1883, under the title of: "An Act concerning liens of mechanics, laborers and material men" Acts of 1883, page 140. Sundry amendments were made to this Act in 1886, 1889 and 1899 but in respects not material to be considered, the title of the original Act remaining undisturbed.

Under the Acts of 1838 and 1843 opinions were handed down by the Supreme Court of the State in the following cases:

McKinney vs. Springer et al., 6 Blackford 511;

Goble vs. Gale et al., 7 Blackford 218;

Pifer vs. Ward et al., 8 Blackford 252;

Little John vs. Millirons et al., 7 Ind. 125;

Bishop vs. Boyle, 9 Ind. 169;

Holland et al. vs. Jones, 9 Ind. 495.

Under the Act of 1852 opinions were handed down by the Supreme Court in the following cases:

67 Deming vs. Patterson, 10 Ind. 251;

Wasson vs. Beauchamp, 11 Ind. 18;

Millikin et al. vs. Armstrong et al., 17 Ind. 456;

Hall et al. vs. Bunte, 20 Ind. 304;

Beck et al. vs. Ensley, 21 Ind. 344;

Gilman et al. vs. Gard, 29 Ind. 291;

Caldwell et al. vs. Asbury, 29 Ind. 451;

O'Halloran vs. Leachey, 39 Ind. 150;

Kellenberger vs. Boyer et al., 37 Ind. 188;

Capp vs. Stewart et al., 38 Ind. 479;

Sharpe et al. vs. Clifford et ux., 44 Ind. 346;
 Stephenson et ux. vs. Ballard et al., 50 Ind. 176;
 Greenup et al. vs. Crooks et al., 50 Ind. 410;
 City of Crawfordsville vs. Johnson et al., 51 Ind. 398;
 Crawfordsville vs. Brundage, 57 Ind. 262;
 Killian et al. vs. Eigenmann, 57 Ind. 480;
 Schneider vs. Kolthoff et al., 59 Ind. 568;
 Princeton vs. Gebhart, 61 Ind. 187;
 Harrington vs. Dollman, 64 Ind. 255;
 Irwin et al. vs. The City of Crawfordsville, 58 Ind. 492;
 Woolen et al. vs. Wishmier, 70 Ind. 108;
 Vail et ux. vs. Meyer, 71 Ind. 159;
 Hamilton vs. Naylor et al., 72 Ind. 171;
 Nordyke, etc. Co. vs. Dickson et al., 76 Ind. 188;
 Mark vs. Murphy et al., 76 Ind. 534;
 Stephenson et ux. vs. Ballard et al., 82 Ind. 87;
 Thompson vs. Shepard, 85 Ind. 352;

In the case of Hall et al. v. Bunte, 20 Ind. 304, the precise question was presented by the record whether the Act of 1852 conformed to the requirements of the Constitution, it being claimed that the law giving the lien was void for the reason that it was not embraced in the title of the Act, as to which claim the Court said:

"During the decade of years that has passed since this Statute was enacted, it has always been regarded in practice as valid, its validity having been repeatedly recognized by this Court. (Citing authorities.) There are undoubtedly other like cases in the forthcoming three volumes of reports not published at the time of the preparation of this opinion."

The cases quoted were four in number and the cases referred to six in number—ten in all. The time that had elapsed from the passage of the Act in question until the handing down of the opinion covered a period of ten years, to-wit: from May 1853 to May 1863.

Under the Act of March 10, 1873 and the Act of May 6, 1883 opinions were handed down by the Supreme Court upholding the right of a contractor and a sub-contractor to maintain and enforce a mechanic's lien in the following cases, thirty-four (34) in all:

Gortemiller vs. Rosengarn et al., 103 Ind. 414;
 Alvey vs. Reed, Guardian, 115 Ind. 148;
 Adams vs. Buhler et al., 116 Ind. 100;
 Midland, etc. Co. vs. Wilcox et al., 122 Ind. 84;
 Goodbub vs. The Estate of Hornung, 127 Ind. 181;
 68 McNamee vs. Rauck et al., 128 Ind. 59;
 McElwaine et al. vs. Hosey et al., 135 Ind. 489;
 Jeffersonville etc. Co. vs. Riter et al., 138 Ind. 170;
 Jenckes vs. Jenckes et al., 145 Ind. 624;
 Totten etc. Co. vs. Muncie Nail Co. et al., 148 Ind. 372;
 Union etc. Assn. vs. Helberg et al. 152 Ind. 139;
 Bird et al. vs. St. John's etc. Church, 154 Ind. 138;
 Duckwell et al. vs. Jones, 156 Ind. 682;
 Sulzer Machiner- Co. vs. Rushville Water Co. 160 Ind. 202;

Lengelsen vs. McGregor et al. 162 Ind. 258;
 Adamson vs. Shaner et al. 3 Ind. App. 448;
 Kulp et al. vs. Chamberlain et al., 4 Ind. App. 560;
 Brigham vs. Dewald et al. 7 Ind. App. 115;
 Vorhees et al. vs. Beckwell, 10 Ind. App. 224;
 Alexandria Building Co. et al. vs. McHugh, 12 Ind. App.
 282;
 Reichart vs. Krass, etc., 13 Ind. App. 348;
 Bratton vs. Ralph et al., 14 Ind. App. 153;
 Conlee et al. vs. Clark et al., 14 Ind. App. 205;
 Davis etc. Co. vs. Vice et al., 15 Ind. App. 117;
 Rhodes et al. vs. Webb, etc. et al., 19 Ind. App. 195;
 Patton vs. Matter, Trustee, et al., 21 Ind. App. 277;
 Montpelier etc. Co. et al. vs. Stephenson et al., 22 Ind. App.
 175;
 Taggart vs. Kem et al., 22 Ind. App. 271;
 McFarlane et al. vs. Foley et al., 27 Ind. App. 484;
 Roberts vs. Koss et al., 32 Ind. App. 510;
 Geo. B. Swift Co. et al. vs. Dolle, Receiver, 39 Ind. App. 753;
 Whitcomb vs. Ball, 40 Ind. App. 119;
 Stephens et al. vs. Duffy, 41 Ind. App. 385;
 Beach et al. vs. Huntsman, 42 Ind. App. 205;

The period, as far as affecting the lien upon railroads being a period of thirty-six years and so far as affecting property generally under the Act of March 6, 1883 covered a period of, to-wit: twenty-six years, and it being expressly held by said Court on the 16th day of January, 1890, in the cause of the Midland Railway Co. v. Wilcox et al., 122 Ind. 84 that contractors and subcontractors under the Railway Act of March 10, 1873 were entitled to maintain and enforce a mechanic's lien upon the railroad property for the work and labor performed and caused to be performed and materials furnished and caused to be furnished in the building of a railroad. So that your orator respectfully submits to your honors that by an unbroken line of cases covering a period of seventy-one years it was held by all of the Courts of the State of Indiana that under the description of "the liens of mechanics" in the title of the Act, provision for the enforcement of liens in favor of contractors and subcontractors in the body of the Act complied with the terms and requirements of the Constitution of the State touching the title of the Act, and it was not until the handing down of the opinion of the Supreme Court in the case of the Indianapolis Northern Traction Company et al. vs. Brennan et al. (87 N. E. 215) on the 18th day of February, 1909 that any doubt or suggestion found its way into the opinions of the Supreme Court of the State that the Acts of the State on the subject of mechanics' liens which purported to confer the right to a mechanic's lien on contractors and subcontractors was contrary to the requirements of the Constitution in that respect, and it, therefore, became and was the settled construction of the Courts of this State that contractors and subcontractors desiring to take and enforce a mechanic's lien were constitutionally pro-

vided for by the legislation of the State and that whatever contracts might be entered into by and between the owner of a railroad and a contractor or subcontractor covered and protected such right.

And your orator says that by virtue and by reason of the enactments of the State of Indiana as Aforesaid as the same were from time to time construed by the courts of the State as hereinbefore set forth, your orator acquired a contract right to have, maintain and enforce a mechanic's lien on the line of the railroad of the defendant The Indianapolis, Crawfordsville and Western Traction Company, extending from Indianapolis through the Counties of Marion, Hendricks, Boone and Montgomery to the City of Crawfordsville for whatever work or labor it might perform or cause to be performed or whatever materials it might furnish or cause to be furnished in the erection and construction of a line of said railroad, which said contract right might not be impaired or destroyed whether by legislative enactment or by judicial construction of the legislature or courts of the State without a violation of the provisions of the Constitution of the United States prohibiting any *any* State from the enactment of any law which should impair the obligation of a contract and it then and there became and was the duty of the courts of the State of Indiana both Appellate and nisi prius in obedience to the mandates of the Constitution of the United States to uphold, maintain and enforce the contract right of the plaintiff to have, maintain and enforce its lien upon said railroad for the work and labor that it had done and caused to be done and the

materials that it had furnished and caused to be furnished,
70 as hereinbefore set forth. But notwithstanding the plain and obvious duty of the courts of Indiana in that behalf, after plaintiff had fully complied with its contract and had fully completed said work and while said action was pending, the Supreme Court of Indiana on to-wit: the 18th day of February, 1909, in the cause of said Indianapolis Northern Traction Company v. Brennan et al. handed down an opinion construing the Act of March 6, 1883, and as subsequently amended, as not authorizing a contractor or subcontractor who had furnished or caused to be furnished materials or had performed or caused to be performed labor in the erection and construction of a line of railroad to hold, maintain or enforce a mechanic's lien for the work and labor performed and caused to be performed and for the materials furnished and caused to be furnished.

And your orator says that said Act of March 6, 1883, as so construed by said Supreme Court was and is in violation of provision of the Constitution of the United States which forbids to any State the right to pass any law which will impair the obligation of a contract, and said construction by said Supreme Court of said Act of March 6, 1883 as announced in said last named cause was and is wholly unconstitutional and void. And your orator says that notwithstanding said opinion so announced by the Supreme Court, it still has the right to maintain and enforce its lien upon said railroad for the work and labor performed and caused to be performed by it and materials furnished and caused to be furnished by it in the erection, construction and completion of said line of railroad,

anything in said opinion of the Indianapolis Northern Traction Company vs. Brennan to the contrary notwithstanding.

And your orator shows that immediately upon the handing down of said opinion a Federal question, to-wit: a question arising under the constitution and laws of the United States, had arisen in said action so still pending in said Superior Court but your orator has reason to fear and does fear that said Superior Court will feel constrained to follow the opinion of the Supreme Court as announced

71 by it in said Indianapolis Northern Traction v. Brennan case, notwithstanding the unconstitutionality of such action, and while thereby a Federal question, to-wit: a question arising under the constitution and laws of the United States, had arisen at the time of the handing down of said opinion, more than one year had elapsed from the time when it gave notice of its intention to hold a mechanic's lien, so that it was not possible for it when said unconstitutional opinion was handed down to bring a direct action in this Court for relief in the enforcement of its mechanic's lien because of the fact that the time had expired within which such an action might be brought, notwithstanding the unconstitutionality of such opinion.

12. Your orator further shows that the original bill in this cause was filed in this court on the — day of —, 1909, more than one year after the filing by your orator of its intention to enforce its mechanic's lien in the Recorders' offices aforesaid nor was your orator made a party defendant to said original bill and there existed no right in your orator to apply to this Court for relief until to-wit: the — day of July, 1909, when by leave of court your orator, The Marion Trust Company, The Allis-Chalmers Company and Guthrie were for the first time made additional defendants by an amendment to the bill of complaint and were likewise made defendants to the cross-complaint of the Traction Company and on, to-wit: the 9th day of July, 1909, by an order duly and properly entered in said cause, one Harry J. Milligan was duly appointed receiver of the property and assets of said Traction Company and duly qualified and entered upon the discharge of his duties as such receiver and said property is now and has ever since remained in the custody and control of this Honorable Court and save and unless this Court shall permit your orator to continue the prosecution of its action to enfee his lien in the Superior Court of Marion County and there have adjudged the rights and priority of the parties and there permit them to be enforced by judicial decree and sale, your orator is remediless in the premises, unless he can be permitted in this action to enforce his mechanic's lien upon the property of the defendant the Traction Company and have adjudged its priority against the other defendants hereto save and excepting the Allis-Chalmers Company, as to

72 which your orator admits the liens are co-equal and co-extensive.

Your orator shows that it would be manifestly unjust, unconscionable and inequitable to tie your orator's hands in the suit that it had properly and seasonably brought in the only form that was then open to it, to-wit: one of the Courts of the State of Indiana,

and forbid it to prosecute its said action so instituted to a final decree for the ascertainment of its rights, the enforcement of its lien and the determination of the priority over that of the other defendants hereto, by the taking possession by his Court through its Receiver of all and singular the property and assets of said Traction Company, the ascertainment and enforcement of the lien of the defendant Trust Company, Trustee, the sale of said property at Receiver's or Master's sale and the distribution of the proceeds arising from such administration of the affairs of said Traction Company among the persons entitled to participate therein, unless this Honorable Court should at the same time permit this cross-plaintiff to intervene herein by its cross-bill and permit it to prosecute its said cross-bill to a final decree as an extension and continuation of the litigation so heretofore and now pending in said Superior Court of Marion County and that upon a hearing upon said cross-bill it should have all the benefit thereof as though said cross-bill had been originally filed herein on the 25th day of August, 1908, and within one year from the date of the filing of its notice of its intention to hold a mechanic's lien upon said railroad property and as though this Court had at that time had jurisdiction of the parties and of the subject matter of said action.

In consideration whereof and for as much as your orator is remediless in the premises at and by the strict rule of the common law and is only relievable in a Court of equity where matters of this kind are properly cognizable and relievable, it files this its cross-bill against the complainant and inasmuch as this cross-complainant is advised and believes that the Marion Trust Company of Indianapolis, Trustee, under the mortgage in the original complaint and hereinbefore mentioned and described, the said
73 William A. Guthrie, the said Allis-Chalmers Company ought to be made parties to this cross-bill, and it prays that it may be authorized to make such parties defendant to this its cross-bill to the end that all the several and respective rights may be determined and protected.

To the end therefore, that the said defendants and each of them may, if they can, show why your orator should not have the relief hereby prayed and that your orator may have that relief which he can only obtain in a court of equity, and that the said defendants may answer the premises but not upon oath or affirmation, the benefit whereof is expressly waived by your orator. He prays the Court to permit this cross-bill to be prosecuted to a final decree as though it had been originally filed in this Court within one year from the time of the filing of its notice of intention to hold a mechanic's lien; that it may be permitted to prosecute this action as a continuation of and in succession to said action so now pending in the Superior Court of Marion County, Indiana; and that upon a final hearing the lien of your orator upon said railroad, right of way, bridges, culverts and all and singular the railroad property of the defendant the Traction Company may be decreed to be sold at Master's sale free and discharged of the lien of all of said defendants and the proceeds thereof applied to the satisfaction of your orator's lien in preference and senior to the lien of the defendant

the Marion Trust Company, Trustee, and the holders of the bonds, secured by the trust deed aforesaid, but not senior but co-equal and co-extensive with the lien of the Allis-Chalmers Company; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of sub-pœnæ to be directed to the said Indianapolis, Crawfordsville & Western Traction Company, the said Marion Trust Company, Trustee, the said Allis-Chalmers Company and the said Wm. A. Guthrie, thereby commanding them at a certain time and under a certain penalty, therein to be limited, personally to appear
 74 before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray, etc.

CARSON AND THOMPSON AND
 WILLIAM D. KETCHAM,

*Sol's for said Cross-plff.,
 the Moore-Mansfield Construction Co.*

STATE OF INDIANA,

Marion County, sct:

Henry A. Mansfield being first duly sworn on his oath states that he has read the above and foregoing cross-bill and that the matters and facts therein contained and set forth are true in substance and in fact as therein averred, so far as the same are stated, upon his personal knowledge and so far as stated upon information and belief the same are true as he is informed and verily believes. And further affiant said not.

HENRY A. MANSFIELD.

Subscribed and sworn to before me the undersigned, a Notary Public within and for Marion County, State of Indiana, this 4th day of December, 1909. Witness my hand and notarial seal.

WILLIAM J. CONDREY, [SEAL.]
Notary Public.

My commission expires Aug. 2, 1913.

EXHIBIT "A" WITH CROSS-COMPLAINT.

Contract.

This agreement, made and entered into this 21st day of February, 1906, by and between The Indianapolis, Crawfordsville & Western Traction Company, first party, hereinafter called the "Traction Company," and the Moore-Mansfield Construction Company, second party, hereinafter called the "Construction Company."

Witnesseth: That,

Whereas, the party of the first part has an authorized capital stock of three million dollars (\$3,000,000), and proposes to issue three million dollars (\$3,000,000) five per cent (5%), thirty (30) year, first mortgage, gold bonds, secured by mortgage on all its property now owned and hereafter to be acquired; and

Whereas, said party of the first part proposes to set apart fifteen hundred thousand dollars (\$1,500,000) par value of such bonds, and fifteen hundred thousand dollars (\$1,500,000) par value, of its capital stock, for the purchase of property, cost, construction, equipment and putting in operation of that part of its line which extends from and within the City of Indianapolis to and within the City of Crawfordsville; and,

Whereas, said party of the first part has contracted with Smith, Wedding and Mansfield and certain other parties for the underwriting and sale of such a portion of the fifteen hundred thousand dollars (\$1,500,000) par value of said bonds and fifteen hundred thousand dollars (\$1,500,000) par value of said stock, as may be necessary for the purchase of property, cost, construction, equipment, and putting in operation of that part of said Traction Company's line from and within the City of Crawfordsville; and

Whereas, said first party desires to contract with said second party, and the said second party desires to build the roadbed, track, bridges, fences, power house, overhead system, furnishing all materials and all equipment and other appurtenances that may be necessary for the complete construction, equipment and putting in operation of the line in and between the above named points, according to plans and specifications to be furnished by the Traction Company.

Now, therefore, in consideration of the mutual agreements
76 herein, and in order to effect the purpose herein expressed, the parties hereto mutually contract and agree as follows, to-wit:

1. The Contractor undertakes and agrees to furnish all materials, machinery, equipment, labor, etc., to be purchased in the name of The Moore-Mansfield Construction Company, and to construct and equip, and put in operation, upon a right of way which the Traction Company agrees to provide, according to plans and specifications to be furnished by the Traction Company, that part of the street and interurban street railroad of the Traction Company, extending in and from the City of Indianapolis to and within the City of Crawfordsville; the same to be completed to the acceptance of

the Engineer and the Executive Committee of the Board of Directors of the Traction Company, and to be free and clear of any claim and demand created by or against the Construction Company for which any lien has been or could be taken upon the railroad or any other property of the Traction Company, or for which said Traction Company, or its railroad, or any other property, has been or could be made liable.

2. The work shall be commenced within ten days after the execution and fulfillment of the above mentioned agreements by and between the Traction Company and Smith, Wedding and Mansfield, and other persons, as to the disposing of bonds and stocks, and shall be prosecuted vigorously and continuously with such force of laborers, teams, tools and machinery as will be sufficient to fully complete the work and place the same in operation, on or before December 31, 1906, strikes and acts of Providence excepted.

3. The Traction Company undertakes and agrees to pay the Construction Company in full for all work done and materials and equipment furnished in constructing and equipping the railroad of the Traction Company, as aforesaid, a sum equal to the cost thereof plus twelve and one-half per cent ($12\frac{1}{2}\%$) of such cost. Such twelve and one-half per cent ($12\frac{1}{2}\%$) to be computed on all Pay Rolls, costs of materials, supplies, machinery, equipment, buildings, insurance, etc., and all other charges paid through said Construction Company incident to the completion of the line, except that no commission shall be paid on the one hundred eighty-seven thousand dollars (\$187,000) of Bonds and the Three Hundred Seventy-five Thousand Dollars (\$375,000) of Stock to be delivered to the Consolidated Traction Company in payment for the Right of Way, grade as now located and constructed, nor for materials on hand; nor for personal time of the officers of the Construction Company.

Estimates of the work done under this contract, including all labor, materials furnished and including cars and machinery of all kinds, are to be made and payment thereon is to be made by the Traction Company at the end of each calendar month by the Engineer of the Traction Company to the Construction Company, or to its order, on or before the tenth day of the month following the month for which the estimate was made.

The cost to the Construction Company of insurance against fire and accidents to the public or employes during the progress of said work, shall be considered a part of the cost, and the above per cent shall be paid upon such items of cost, and shall be included in the first estimate allowed and paid after the expenditure therefor has been made.

4. If the Engineer of the Traction Company shall at any time be of the opinion that the Construction Company is neglecting the work, or is not progressing with the work as fast as necessary, or has not sufficient force employed to insure its completion within the time and in the manner required, or is otherwise violating any of the provisions of this contract, said Engineer, in behalf of the

Traction Company, shall have the power, and it shall be his duty to order and direct the Construction Company to remedy such imperfections, proceed more rapidly with said work, increase his force, or otherwise comply with the provisions of this contract, within three days after service of notice, or within such additional time as may be named therein; and upon the failure or refusal of the Construction Company to comply with such order and direction, said Engineer shall have the power and authority in behalf of the Traction Company, and it shall be his duty to take such steps as to him seem desirable, expedient or necessary to bring about the result.

5. Any notice to be given by the Traction Company to the Construction Company under this contract shall be deemed to be properly served if the same be left at any office used by the Construction Company, or with its foreman or agent, at or near the work, or delivered to any of its foremen upon the work, or deposited in the postoffice, postpaid, addressed to the Construction Company at his last place of business.

6. Before final settlement is made between the parties
78 hereto for work done and materials furnished under this contract, and before any right of action shall accrue to the Construction Company against the Traction Company therefor, the said Construction Company shall furnish evidence satisfactory to the Engineer of the Traction Company that the work covered by this contract is free and clear from all liens for labor or material, and that no claim then exists against the same for which any lien could be enforced.

7. Before final payment shall be required to be made by the Traction Company under this contract, the Construction Company shall acknowledge and deliver under its hand and seal, a release and discharge of and from any and all such claims and demands for and in respect of all matters and things growing out of, or connected with this contract, or the subject-matter thereof, and of or from all claims and demands whatsoever.

8. No Sub-contract shall be made by said Construction Company without the approval of the Executive Committee of the Traction Company.

9. No contract for supplies, machinery, equipment or material of any kind involving the expenditure of the funds of the Traction Company shall be entered into by the Construction Company without the approval of the Executive Committee of the Traction Company.

10. The party of the second part shall furnish all tools and equipment of proper and modern design, for the safe, rapid and economical construction of the line, at its own cost, and such tools and equipment shall remain the property of the second party.

11. If payments for work, material, etc., are not made to the Construction Company on or before the 10th of each month, for the work done for the previous month, then the Construction Company shall have the right to stop all work until such payments are
made.

79 In witness whereof, the parties have hereunto subscribed their names in duplicate, this 21st day of February, 1906.

INDIANAPOLIS, CRAWFORDSVILLE
& WESTERN TRACTION COMPANY,

(Signed) By P. C. SOMERVILLE, *President*.

[SEAL.]

Attest:

(Signed) T. C. CRABBS, *Sec'y*.

THE MOORE-MANSFIELD
CONSTRUCTION COMPANY,

(Signed) By H. A. MANSFIELD, *President*.

[SEAL.]

Attest:

(Signed) DEWITT V. MOORE, *Sec'y*.

80

EXHIBIT "AA".

This agreement, made this 6th day of June, A. D. 1906, and executed in triplicate between the Indianapolis, Crawfordsville & Western Traction Company, a corporation organized under and by virtue of the laws of the State of Indiana, and hereinafter referred to as the "Railway Company," party of the first part, and Electrical Installation Company, a corporation duly organized under and by virtue of the laws of the State of Illinois, hereinafter referred to as the "Contractor," party of the second part,

Witnesseth: That,

Whereas, the Railway Company by virtue of its charter is authorized to construct and operate a line of electric railway from the City of Indianapolis, Indiana, via Clermont, Brownsburg, Pittsboro, Raintown, Lizton, Jamestown, New Ross, Mace, Crawfordsville, Wayne-town, Hillsboro, Veedersburg, Covington, Indiana, to the Indiana-Illinois state line east of the City of Danville, Illinois; and

Whereas, the Railway Company, has procured a private right of way from the city limits of Indianapolis to the City of Crawfordsville, and has procured franchises in the several towns between these points and a contract with the Indianapolis Traction & Terminal Company, providing for an entrance to the Terminal Building in Indianapolis, and has completed the grading of roadbed ready for the ties; and

Whereas, the Railway Company has entered into a contract with the Moore-Mansfield Construction Company, of Indianapolis, Indiana, covering the construction of the track, bridges, culverts, etc; and

Whereas, the Railway Company has duly authorized an issue of \$3,000,000 of its first mortgage 5 per cent 30-year gold bonds secured by mortgage on all of its property now owned and hereafter to be acquired, and has set apart for the construction and equipment

of its line from the City of Indianapolis to and in the City of Crawfordsville \$1,500,000 par value of such bonds and \$1,500,000 par value of its capital stock; and

Whereas, an underwriting agreement dated February 21, 1906, with reference to the bonds and stock herein mentioned, has been duly executed between the said Railway Company and certain persons mentioned in said underwriting agreement as the "Subscribers," and under said agreement at the date of the execution of this contract, namely, June 6, 1906, not less than 900 bonds of the

81 par value of \$900,000 have been in good faith subscribed for by responsible parties; and

Whereas, a copy of this contract has been deposited with the Marion Trust Company, Indianapolis, Indiana, the Trustee of the Bonds herein mentioned; and

Whereas, the Contractor proposes to undertake the construction and equipment covered by the attached specifications;

Now, therefore, in consideration of the premises and of the mutual agreements and considerations herein expressed it is hereby agreed:

I.

The Contractor undertakes and agrees to do all the work and furnish all the materials for the construction and equipment of the pole line, overhead electrical circuits, power house and sub-station buildings and machinery, repair shop and rolling stock for a single track and turnouts electric railway to be built from Indianapolis to Crawfordsville for the Railway Company, in all respects according to the specifications hereto attached and made a part hereof, all which work shall be completely done and finished on or before the first day of March, 1907, unless the Contractor shall be delayed by any cause mentioned in Clause II.

II.

The Railway Company hereby agrees to provide the Contractor *will* all necessary rights of way and permits and real estate for location of power house and sub-station buildings, and save the Contractor harmless from loss occasioned by lack of such rights of way, permits and real estate, or from delays caused by municipal, corporate or individual interference with the progress of the work after same shall have been started, where such interference grows out of anything done or omitted by the Railway Company, or is the act of its own officers or employees, and agrees that the Contractor shall not be held responsible for work done, material furnished or repairs made by others, and the Contractor shall not in any event be held responsible or liable for any loss, damage, detention, or delay caused by fire, strikes, civil or military authority, insurrection or riot, failure of other contractors or by any other cause beyond control of the Contractor.

III.

The Railway Company agrees not to hinder the Contractor from prosecuting the work uninterruptedly from start to finish, and agrees

that that portion of the construction work which is to be done by The Moore-Mansfield Construction Company shall be completed free from any claim of indebtedness, the holders of which may under the laws of the State of Indiana or of the United States be entitled to a lien of any kind against any of the property of the Railway Company, so that the Railway Company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said Railway Company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana.

IV.

The Railway Company shall have the right to make changes in the plans and specifications for the work to be done and materials to be furnished by the Contractor, and where such changes add to the work to be done or materials furnished, there shall be added to the contract price as the entire compensation to be paid the Contractor therefor, the cost of such changes plus 10 per cent of such cost and where such changes reduce the work to be done or materials furnished, there shall be deducted from the contract price the cost plus ten per centum of doing the work or furnishing the materials embraced in such changes. No change in the plans or specifications, whether involving an increase or decrease of work to be done or materials furnished, shall be made by the Railway Company without notifying the Contractor in writing thereof. In case it becomes necessary during progress of the work to excavate any rock, the Contractor shall notify the Engineers of the Railway Company of such necessity before proceeding with such work, and if found by such Engineers to be necessary, such excavation shall be regarded as extra work. The Contractor shall have no allowance for rock excavation or other work or materials unless it makes claim therefor in writing to said Engineers before allowance of the estimate for the month in which the work is claimed to have been done or materials furnished, nor for any extra work, including rock excavation, or any extra materials, unless the same shall have been required or authorized by the said Engineers before the same was done or furnished. The Contractor shall, as full compensation for all extra work and materials, including rock excavation, be allowed the cost thereof, plus ten per centum.

V.

The Contractor agrees to provide for and carry at its own cost insurance against personal injury to all persons in its employ engaged on this work, and against personal injury to the public, and save the Railway Company harmless from loss on account of personal injury to Contractor's employees or to the public when such injury is caused by car-lessness or neglect of the Contractor.

The Contractor also agrees, to carry, during construction, fire insurance for the protection of both parties according to their respective interests upon all insurable property covered by this contract, except copper, iron wire and other metals.

The Contractor agrees to provide temporary crossings, red lights or other danger signals where necessary and shall remove all surplus materials or debris, leaving the streets and sidewalks in good condition.

The Railway Company agrees to require all other contractors doing any work along this line to carry liability insurance for their own account.

VI.

The Railway Company shall have the right, before final acceptance of the work done and materials furnished under this contract, to reject any work or material furnished by the Contractor found defective, and require the Contractor to provide other work or material to replace the same within reasonable time, provided, however, that the Railway Company shall appoint, whenever requested by the Contractor, a duly and fully authorized representative to inspect poles and lumber at point of shipment, and it is agreed that the inspection of such representative shall be at the Railway Company's expense and shall be final in all respects.

VII.

Should the Railway Company be allowed by the Contractor under a mutual satisfactory arrangement to do any portion of the construction work, it is agreed that the Railway Company shall pay the same rate of wages to men of the same class as is paid by the Contractor, and the Railway Company shall on or before the commencement of operating the road, render an accounting to the Contractor
84 of the cost of all work not included in this contract, so that both parties to this agreement may have exact knowledge of the value of all property underlying the bonds.

VIII.

The Railway Company shall have a competent and experienced engineer and a competent inspector of the work. Both of these men shall be of recognized ability and experience in their respective lines and their services shall be available to the contractor at all reasonable times, so that prompt and intelligent decisions may be given as the work progresses and so that estimates may be promptly passed upon when due.

IX.

The Railway Company agrees that it will not offer for sale any of the bonds on its line between Indianapolis and Crawfordsville at less than 90 per centum of the par value thereof and accrued interest, without first submitting the terms of such offer to the contractor and obtaining the contractor's approval in writing. The provisions of this article shall be in force up to July 1, 1907.

K.

It is further agreed by and between the parties hereto that in consideration of the materials, apparatus and labor furnished by the contractor that the Railway Company shall pay the contractor the sum of five hundred and sixty thousand dollars (\$560,000), as follows:

For Copper:

100 per cent. payable on delivery F. O. B. cars Indianapolis, Crawfordsville or intermediate points.

For all machinery and apparatus, also for cars and trucks:

50 per cent. payable by sight draft with bill of lading or shipping receipt attached.

Balance of 50 per cent. on machinery and apparatus, cars and trucks, shall be due and payable 30 days after date of bill of lading or shipping receipt. The contractor shall have the right to control

the movement, routing and place of delivery of all material, machinery, apparatus and equipment covered by this contract, but the same shall not be delivered unnecessarily or unreasonably in advance either in time or amount of the requirements for its use in the progress of construction, and to this end the contractor shall consult with H. A. Mansfield, of The Moore-Mansfield Construction Company as to the advisable time for shipment.

For all other material and for all labor estimates shall be rendered to the Railway Company by the contractor on or about the first of each month after the commencement of work or delivery of materials. Each such estimate shall include all materials delivered and labor performed during the preceding month. In order to facilitate the calculation of accrued interest on bonds, it is agreed that the due date of each estimate shall be considered as the first day of the month following the month for which the estimate is made, and that each estimate shall be payable on presentation to the Railway Company by the contractor, and approved by the Railway Company's engineers.

Estimates shall be regarded as approximately correct and shall be considered as partial payments during construction and such payments shall not be construed as an acceptance of the work and materials on account of which they are made, but the operation of electric cars for profit after the 15-day test provided for in the specifications shall constitute an acceptance by the Railway Company of all that portion of the work, material and apparatus used in the operation of such cars.

The contractor agrees to accept in part payment for all material, apparatus and work to be furnished under this agreement first mortgage 5 per cent. gold bonds of the Railway Company to the amount of Two Hundred and Twenty-five Thousand Dollars (\$225,000) par value and common stock of said Railway Company to the amount of Two Hundred and Twenty-five Thousand Dollars (\$225,000) par value. The contractor agrees to accept the above named bonds and stock in payment of Two Hundred Two Thousand Five Hundred Dollars (\$202,500) of the contract price hereinbefore mentioned, and it

is agreed that to facilitate the calculation of payments due, they shall be paid approximately two-thirds in cash and one-third in bonds and stock at the rate aforesaid, it is understood that the stock remains in the hands of the Trust Company as provided in the underwriting.

86 The accrued interest on coupons shall be adjusted at the expiration of the interest period, at which time the contractor shall collect from the Trustee cash in full for all coupons owned by the contractor and credit the Railway Company on the next estimate the interest from the commencement of said interest period up to the date the bonds become due the contractor under the provisions of this agreement. It is agreed that no interest coupons shall be clipped from any bonds until the expiration of the interest period, and the Railway Company agrees that the Trustees shall be provided with funds to meet interest coupons promptly on the due date thereof during the progress of work under this contract.

XI.

The contractor shall not be required to commence work or delivery of materials under this contract until all of the bonds of the Railway Company covering its line between Indianapolis and Crawfordsville, Indiana, have been signed, and certified by the Trustees, and the Railway Company shall thereupon cause to be set aside in the hands of the Trustee all of the bonds and stock to be issued to the contractor or its order under this agreement. The Railway Company agrees to furnish the contractor with a written statement of the Trustee to the effect that the said bonds and stock have been set aside in accordance with this clause. Each order on the Trustee for bonds and stock in favor of the contractor shall be signed by the President and attested and sealed by the Secretary of the Railway Company. Each order shall be executed in triplicate, one copy for the Trustee, one for the contractor and one for the Railway Company.

XII.

To insure the faithful performance by the contractor of its duties under this contract it is agreed that seven and one-half per centum of the whole amount of each estimate allowed the contractor for materials, apparatus or work furnished under the provisions of this contract shall be retained out of the bonds and shares of stock which the contractor is to take in part payment of such estimate, at the rate at which the same are to be taken in payment as herein provided, viz., 90 per centum of par value, which retained bonds and shares of stock shall not be delivered to the contractor until the completion of its work under this contract and acceptance of the same as herein provided. But such percentage shall not be retained from the amounts allowed the contractor for extra work, nor shall the provision hereinbefore mentioned for part payment in bonds and shares of stock apply to amounts due for extra work, which shall be paid in full in cash.

XIII.

The Moore-Mansfield Construction Company hereby approves all and singular the terms, agreements, provisions, and conditions of this contract, and the specifications in connection therewith, and agrees that it will do all act- necessary to the carrying out of this agreement so far as the same relates to The Moore-Mansfield Construction Company, and it is agreed that the covenants of this agreement shall extend to and bind the successors, assigns and representatives of the Railway Company and contractor.

XIV.

The expressions "The Engineers of the Railway Company" and "The Railway Company's Engineers," as used in this contract and the specifications attached hereto, are understood to mean George F. Huggins and H. A. Mansfield, and in case of the death or inability of either to act, the person substituted for him by the Railway Company. If they are unable to agree as to any matter for their decision, they shall select a disinterested umpire of recognized ability. Said Huggins is recognized by the contractor as a competent and experienced engineer within the requirement of Article VIII of this contract.

In witness whereof, the said Indianapolis, Crawfordsville & Western Traction Company has caused its corporate name to be signed hereto by its President and its corporate seal to be hereto affixed by its Secretary, and said Electrical Installation Company has caused its corporate name to be signed hereto by its Vice-President and its corporate seal to be affixed hereto by its Secretary, and The Moore-Mansfield Construction Company has caused its corporate name to be signed hereto by its President and its corporate seal to be hereto affixed by its Secretary, this 6th day of June, A. D.,
88 1906.

INDIANAPOLIS, CRAWFORDSVILLE &
WESTERN TRACTION COMPANY,

By A. F. RAMSEY, *President*.

Attest:

EDWARD HAWKINS, *Secretary*.

ELECTRICAL INSTALLATION COM-
PANY,

By A. M. HEWES, *Vice-President*.

Attest:

— — —, *Secretary*.

THE MOORE-MANSFIELD CONSTRUC-
TION COMPANY,

By H. A. MANSFIELD, *President*.

Attest:

DEWITT V. MOORE, *Secretary*.

Executed in triplicate.

89-129 This is to certify that we have received a copy of the within contract and specifications, duly executed, the same to be held by us in lieu of an underwriting agreement signed by A. M. Hewes, for two hundred and twenty-five thousand dollars (\$225,000) par value of the bonds and stock of the Indianapolis, Crawfordsville & Western Traction Company which underwriting agreement so signed has been returned to said A. M. Hewes.

THE MARION TRUST COMPANY,

By ———, *President.*

130 & 131

SCHEDULE "B."

Credits.

1907.			
Feb. 15.	4 brls. cement @ 1.54.....	6.16	
	Plus 12½%.....	.77	
			6.93
	Kahn Bars 860# @ #3¾¢.....	32.25	
	Labor Hauling 20 hrs. @ 35¢.....	7.00	
	Plus 12½%.....	4.90	
			44.15
	Pay Roll Nov. 26 to Jan. 17 constructing dredge.....	456.14	
	Plus 12½%.....	57.02	
			513.16
	Work for Elec. Inst. Co.....	60.64	
	Plus 12½%.....	7.58	
			68.22
	Cement bags returned (See Est. #14)		
	12½% on 1248.26		156.03
Feb. 21.	Rails sold Interstate Traction Co.		
	4-30' Rails—40 yds. @ 70#		
	2800# @ 15½¢.....	43.40	
	½ Keg Goldie Spikes.....	2.50	
	30 Cross ties @ 67½¢.....	20.25	
	8 Splice Bars—4 prs.....	3.20	
	20 bolts @ .02.....	.40	
	Labor	5.00	
			74.75
Mar. 24.	1 New cross beam & labor Eng. 10..	7.80	
	Plus 12½%.....	.97	
			8.77
July 25.	1 car coal #S. I. 3155.....	3.15	
	1 " " S. I. 4094.....	3.11	
	1 " " S. I. 2476.....	10.85	
	1 " " S. I. 5611.....	32.71	
	1 " " S. I. 5603.....	42.60	
	1 " " S. I. 3770.....	32.25	
			124.87

1906.			
Oct. 30.	Error in Pennyfeather Pay Roll...	31.85	
	Plus 12½%.....	3.98	
			35.83
			<hr/> 1032.51

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EXHIBIT "C" WITH CROSS-COMPLAINT.

Notice of Mechanic's Lien.

SEPTEMBER 6TH, 1907.

To the Indianapolis, Crawfordsville & Western Traction Company
and all others concerned:

You are hereby notified that the undersigned intends to hold a mechanic's lien for the sum of Forty Thousand Dollars (\$40,000.00) upon the following described property, in the State of Indiana, to-wit:

The right of way of said Traction Company, running from the west side of the City of Indianapolis, in Marion County, Indiana, in a Northwesterly direction to and through Clermont, in Wayne Township, in said Marion County; thence, continuing in a northwesterly direction to and through Brownsburg, in Lincoln Township, Hendricks County, Indiana; thence continuing in a northwesterly direction to and through Pittsboro in Middle Township, in Hendricks County, Indiana; thence continuing in a northwesterly direction through Raintown in said last named County, to and through Liston, in Union Township, Hendricks County, Indiana; thence continuing in a northwesterly direction along and across the Northeast corner of Eel River Township, in said Hendricks County, to and through Jamestown, in Jackson Township, Boone County, Indiana; thence continuing in a northwesterly direction to and through New Ross, in Walnut Township, Montgomery County, Indiana; thence continuing in a northwesterly direction across said Walnut Township to the City of Crawfordsville, in Union Township, Montgomery County, Indiana; said right of way being parallel or adjoining or adjacent to the right of way of the Peoria & Eastern

133-135 (West) Division of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company; also the real estate in or adjacent to said City of Crawfordsville, on which is located the Power House and Car Barns of said Traction Company; also all of the roadbed, ballast, ties, wires, wire fastenings, switches, tracks, sidings, fences, bridges, culverts, power-houses, sub-stations, car-barns, electrical machinery and equipment in power-houses and sub-stations, and also electrical machinery and equipment on or along the said right of way, consisting of poles, pole arms, insulators, food wires and food cables, trolley wires, guy-wires, telephone wires and boxes, lightning arrestors, rail bonds and cross bonds, situated on or along said right of way or said other real estate; also all easements, rights and privileges to occupy, use or run over any highway, street, alley or public place along said right

of way, or crossed by said right of way, or within any of the above-named towns or cities; also all franchises owned or held by said Traction Company; said Mechanic's Lien of Forty Thousand Dollars (\$40,000.00) being for work and labor performed and materials furnished by the undersigned in the erection and construction of the above described property, which work and labor was done, and said materials furnished by us at your special instance, and request and within the last Sixty (60) days.

[SEAL.]

THE MOORE-MANSFIELD CONSTRUCTION COMPANY,

(Signed) By DE WITT V. MOORE, *Vice-President*.

Attest:

(Signed) DE WITT V. MOORE, *Secretary*.

136 *Petition of the Marion Trust Company for Leave to File Cross Bill.*

Comes now The Marion Trust Company and shows to the Court that heretofore, on the 21st day of May 1906, the defendant Indianapolis, Crawfordsville & Western Traction Company executed to this petitioner, as Trustee, a certain mortgage or deed of trust to secure a proposed issue of Three Million Dollars (\$3,000,000) of bonds, executed by said defendant Traction Company.

That One Million Five Hundred Thousand Dollars (\$1,500,000) of bonds were executed, issued and sold, and are now outstanding in the hands of purchasers for full value.

That because of the failure of said defendant Traction Company to pay the interest on said bonds as the same mature this petitioner has, under a power given by said mortgage or deed of trust, declared all of said bonds to be immediately due and payable.

That this petitioner has been made a defendant to the original cross-bill in the above case, and also to certain cross-complaints and intervening petitions filed in said cause by leave of Court by other parties.

Your petitioner prays leave to file a cross-bill of complaint in said cause making said original complain-t, and all other parties to said cause, defendants to its said cross-bill of complaint, for the foreclosure of its said mortgage or deed of trust.

And it herewith tenders its verified cross-bill of complaint, and prays the Court to consider the same on aid of this petition.

Respectfully submitted,

HUGH DOUGHERTY.

137 Subscribed and sworn to before me by Hugh Dougherty, President of said The Marion Trust Company, this 29th day of January, 1910.

[SEAL.]

MSRGARET L. SHULER,

Notary Public.

My commission expires December 1, 1910.

And afterwards, to-wit, at the November Term of said Court, on the 29th day of January, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Marion Trust Company, Trustee, by Messrs. Miller, Shirley & Miller, its solicitors, and files its petition for leave to file a cross-bill herein, and said petition being now granted by the court, said petitioner now by leave of court files its cross-bill herein, in the words following, to-wit:

138 *The Cross-Bill of Complaint of the Marion Trust Company,
Trustee.*

Comes now said cross complainant, The Marion Trust Company, Trustee, and by leave of Court first had and obtained files its cross bill of complaint in said cause against said Indianapolis, Crawfordsville & Western Traction Company, Electrical Installation Company, The Moore-Mansfield Construction Company, Allis-Chalmers Company, William A. Guthrie, The Sinker-Davis Company, Morton L. Jamison, George Shelley, John S. Brown, Edward Hawkins, Albert A. Barnes, Andrew E. Reynolds, Alansen A. Hewes, Charles N. Van Cleave, Sterling R. Holt, Peter C. Somerville, Ezra C. Voris, Harry J. Milligan, Receiver of said Indianapolis, Crawfordsville & Western Traction Company and Consolidated Traction Company, and thereupon your orator shows unto your Honors:

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That heretofore, towit: on the 28th day of June, 1909, said Electrical Installation Company, which was at that time, and is now a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, and is a citizen of said State, filed the original bill of complaint herein.

II

That among other things it was averred in said original bill of complaint that said defendant, Indianapolis, Crawfordsville & Western Traction Company, was indebted to said complainant in a large sum, to-wit: \$3,700.00 which was past due; that said defendant was insolvent and unable to pay its matured and maturing obligations, and praying among other things that a writ of subpoena be issued and directed to said defendant Traction Company, requiring said defendant to appear and make answer to said cross bill of complaint; that a receiver be appointed for said defendant Traction Company; that its assets be marshaled; that the various rights of all its creditors be ascertained, including the rights of said complainant; that the entire assets of said defendant be sold and the fund derived therefrom administered and distributed in accordance with the rules of equity to the creditors of defendant Traction Company according to their respective rights.

III.

That thereafter, towit: on the 8th day of July, 1909, said Traction Company, leave of Court being theretofore granted it so to do, filed its cross bill of complaint, wherein said cross complainant Traction Company prayed among other things the appointment of a receiver for it, and further prayed that it be authorized by proper amendment to make defendants to its said cross bill of complaint this cross-complainant, Marion Trust Company, Trustee, said Moore-Mansfield Company, and others.

IV.

That thereafter, towit: on the 9th day of July, 1909, said original complainant, Electrical Installation Company (leave of Court
140 being first granted it so to do) filed an amendment to its said bill of complaint, making said William A. Guthrie, Allis-Chalmers Co., Moore-Mansfield Construction Company, and this cross complainant, Marion Trust Company, Trustee, parties defendant to said original bill of complaint.

V.

That thereupon this Honorable Court appointed one Harry J. Milligan receiver of and for said defendant, Indianapolis, Crawfordsville & Western Traction Company, and directed him to immediately qualify in accordance with said appointment and take over the possession of said defendant, Interurban Railroad Company, and all other assets of said defendant Traction Company of every kind, character and description, and operate the same under the order and direction of said Court; that said Milligan as such receiver did in compliance with said order and appointment immediately qualify as such receiver and took possession of said railroad and now holds, controls and operates the same, and possesses and controls all assets of said corporation defendant subject to and under the direction of this Court.

VI.

Your orator further shows unto your Honors that afterward, towit: on the 6th day of December, 1909, the Moore-Mansfield Construction Company, which is a corporation existing under and by virtue of the laws of the State of Indiana (by leave of this
141 Honorable Court first had and obtained) filed its cross bill of complaint in this cause against said The Indianapolis, Crawfordsville & Western Traction Company, Electrical Installation Company, The Allis Chalmers Company, and your orator, Marion Trust Company, Trustee, wherein it is alleged among other things that on the 21st day of February, 1906, said defendant Traction Company, being the owner of certain franchises, rights of way, and real estate situated and located in the counties of Marion, Hendricks, Boone and Montgomery, in the State of Indiana, and being desirous of constructing thereon a certain interurban traction line extending from the city of Indianapolis to the city of Crawfords-

ville through a portion of said counties, entered into a certain contract in writing with said Moore-Mansfield Company, a copy of which marked "Exhibit A" is alleged to be filed with said cross bill of complaint, whereby, as alleged in said cross bill of complaint, said Moore-Mansfield Company undertook to furnish all the materials, machinery, equipment, labor, etc., to fully complete according to plans and specifications to be furnished by said Traction Company that portion of its interurban railroad extending from the city of Indianapolis to the city of Crawfordsville in consideration of which it is alleged in said cross complaint that said Traction Company agreed to pay a sum equal to the cost of such service plus 12½% thereof except that no commission should be paid on certain bonds and stock issued or to be issued and delivered to the consolidated

142 Traction Company in payment for the right of way grade as then located and constructed, nor for the materials on hand, nor for the personal time of the officers of said Traction Company.

That thereafter said Moore-Mansfield Company entered upon the construction of said work and fully completed the same at a cost, including said 12½%, of \$516,733.34, a bill of particulars of which is alleged to be filed with said cross bill of complaint and marked "Exhibit B."

That of said sum \$488,714.59 is alleged to have been paid, leaving an alleged balance of \$28,016.75, which it is alleged in said cross bill has remained due it from the 7th day of September, 1907.

That in the said cross bill of complaint of said Moore-Mansfield Company it is further alleged among other things that on the 7th day of September, 1907, it caused notice to be filed in the various counties through which said line of railroad runs of its intention to hold a mechanic's lien upon said railroad and all appurtenances thereto, a copy of which notice is alleged to be filed with said cross complaint and marked "Exhibit C"; that at the time said contract was entered into between said Moore-Mansfield Company and said defendant Traction Company and said defendant Traction Company it was the settled law (as alleged in said cross complaint) of the State of Indiana that persons or corporations furnishing labor or material in the construction of such railroads were entitled to hold and enforce a mechanic's lien for any indebtedness accruing in favor of the person or corporation performing or furnishing said labor or material; that relying upon said alleged rule of law said cross

143 complainant within one year from the time said alleged indebtedness accrued brought suit in the Superior Court of Marion County, Indiana, for the collection thereof and the enforcement of said mechanics' lien, and that thereafter and before the determination of said cause the Supreme Court of Indiana decided that persons or corporations in like situation to that of said cross complainant, Moore-Mansfield Company, were not entitled to acquire or enforce a mechanic's lien for labor or material so performed and furnished in the construction of a railroad, and that by reason of said decision the contract rights of said cross complainant

had been impaired and would be impaired and violated and thereby the Constitution of the United States violated unless through the interposition of this Court and cross complainant's rights under said contract are enforced.

That it is further alleged in said cross bill of complaint of said Moore-Mansfield Company that by reason of said facts so alleged as above set forth it holds and is entitled to maintain and enforce a mechanic's lien in the hands of said receiver, paramount and senior to the rights of your orator as trustee under a certain mortgage or deed of trust mentioned in said cross bill of complaint hereafter fully described and set forth in this cross bill of complaint, or the rights of the bondholders issued under and secured by said mortgage or deed of trust.

That in said cross bill of complaint of said Moore-Mansfield Company it is prayed among other things that upon the final hearing of said cause the property of said defendant Traction Company shall be sold and the proceeds thereof applied first to the satisfaction of said alleged lien of said Moore-Mansfield Company in preference and senior to the lien of your orator, said Marion Trust Company, Trustee, and the bondholders secured thereby; that your orator and said Allis Chalmers Company and said William A. Guthrie be required under penalty to answer said cross bill of complaint of said Moore-Mansfield Company.

VII.

Your orator further shows unto your Honors that heretofore, to-wit: on the 21st day of May, 1906, said defendant, Indianapolis, Crawfordsville & Western Traction Company, hereafter referred to for brevity as the "Traction Company," being heretofore duly and legally authorized so to do, by its proper officers executed and delivered to your orator as trustee and to its successors or successors in trust and to its assigns a certain mortgage or deed of trust upon the following described property, rights and franchises of said Traction Company then owned or thereafter to be acquired by it, to-wit: "all and singular the lines of railroad constructed and belonging to and in process of construction by the Traction Company, extending from and in the city of Indianapolis by way of the towns of Clermont, Brownsburg, Pittsboro, Rainstown, Lizton, Jamestown, New Ross and Mace to and in the city of Crawfordsville, and through and from said city by way of the towns of Wesley, Waynetown, Hillboro and Veedersvurg, in and through the city of Covington, and in and through the counties of Marion, Hendricks, Boone, Montgomery, Fountain, Warren and Vermillion, in the State of Indiana, to the western boundary of the State of Indiana at a point east of the city of Danville, in the State of Illinois, and all branches and extensions thereof, together with all lines of railroad and branches and extensions which may hereafter be constructed or otherwise acquired by said Traction Company; and also all and singular the lands, rights of way, and real and leasehold estate, already, or hereafter to be, acquired by the Traction Com-

pany, and used or intended to be used for the said lines of railroad or otherwise; and also all and singular the engines, cars, rolling stock, dynamos, equipment, machinery, tools, implements, materials, furniture, fuel, supplies, contracts, books, documents, choses in action, and other chattels, and personal estate belonging to, or hereafter to be acquired by, the Traction Company; and also all and singular the franchises, rights and privileges that the Traction Company now has, or may hereafter acquire, for, or in respect of the said railroad or any branch or extension thereof, or the construction, maintenance, improvement, working, or use of the same, or otherwise, together with all stations, warehouses, power houses, machine shops, bridges, structures, approaches, works, privileges, easements, and appurtenances to, or with, the said premises or any part thereof, now, or at any time during the continuance of this security, appertaining or enjoyed, and all other property, real and personal, rights, privileges, franchises, and easements of every kind and nature, whether now owned or hereafter acquired by the Traction Company, together with all rents, rolls, earnings, profits, revenues, or income, arising or to arise from the property or any part thereof hereby mortgaged, and whether the same be now owned or hereafter acquired.

To have and to hold the said premises hereinbefore expressed to be hereby granted unto and to the use of the Trustee and its successors and assigns forever."

In trust, however, for the purposes expressed in said mortgage or deed of trust and to secure certain bonds authorized.

Your orator further shows unto your Honors, that after said mortgage and bonds were executed, to-wit: on the 18th day of August, 1906, said Indianapolis, Crawfordsville & Western Traction Company acquired by purchase certain lands in Montgomery county,

146 Indiana, upon which to construct a power house, and equipment to be used in connection with its said line of railroad, and that said power house has since been erected thereon and said lands are now used in connection with, and are necessarily appurtenant to said line of railroad for the purposes aforesaid; which lands are described as follows, to-wit:

Part of the east half of the northeast quarter of section thirty-one (31), township nineteen (19) north of range four (4) west, bounded as follows: Beginning at an iron pin in the center of the Crawfordsville and Lafayette Pike, two chains sixteen and one-half links distance in a northerly direction from the Sperry Mill and running thence south 83 degrees east eighty-one (81) feet; thence north 69 degrees east one hundred and one (101) feet; thence north 58½ degrees east one hundred sixty (160) feet; thence north 44½ degrees east sixty-six (66) feet; thence south 85 degrees and 5 minutes east eighty-two and one-half (82½) feet; thence south 23 degrees east twenty (20) rods eight and two thirds (8⅔) feet; thence south eleven and one-half degrees west thirty-seven (37) rods and fourteen and one-half (14½) feet to Sugar Creek; thence down said stream with the meanderings thereof about forty-five (45) rods to the center of the Crawfordsville and Lafayette Pike; thence north 35 degrees east three hundred and eighty-five (385) feet to the place

of beginning, and containing twelve and thirty hundredths (12 30/100) acres, more or less.

Also the undivided one-half ($\frac{1}{2}$) of part of the west half of the southwest quarter of section twenty-nine (29), township nineteen (19) north, range four (4) west, bounded as follows: Beginning at a point four and one-half ($4\frac{1}{2}$) rods west of the southeast corner of the west half of the southwest quarter of said section twenty-nine (29) and running thence north 28 degrees and 40 minutes west sixteen (16) rods; thence north 8 degrees and 20 minutes west twenty-six (26) rods and ten (10) links; thence north fourteen (14) rods; thence west twenty-one and one-half ($21\frac{1}{2}$) rods; thence south 24 degrees and 30 minutes west thirteen (13) rods and nine (9) links; thence south 10 degrees west twelve and one-half ($12\frac{1}{2}$) rods; thence south 10 degrees and 30 minutes east fifteen (15) rods; thence south 42 degrees and 40 minutes east twenty (20) rods and six (6) links; thence east twenty-four (24) rods to the place of beginning, containing nine and sixty-seven hundredths ($9\frac{67}{100}$) acres more or less.

147 Also the undivided one-half ($\frac{1}{2}$) of part of the west half of the northwest quarter of section thirty-two (32), township nineteen (19) north, range four (4) west, bounded as follows: Beginning at a point four and one-half ($4\frac{1}{2}$) rods west of the northeast corner of the west half of the northwest quarter of said section thirty-two (32) and running thence south 18 degrees east twenty (20) rods; thence south 9 degrees and 45 minutes west twenty-four (24) rods; thence north 35 degrees and 45 minutes west forty-seven (47) rods; thence east twenty-four (24) rods to the place of beginning, containing three and twenty-three hundredths ($3\frac{23}{100}$) acres, more or less.

Also the right of ingress and egress to and from said land along the line of the Chicago, Indianapolis and Louisville Railway, formerly the Louisville, New Albany and Chicago Railroad.

Also the undivided one-half ($\frac{1}{2}$) of all grounds occupied by the mill dam across Sugar Creek situated on the west half of the northwest quarter of said section thirty-two (32), township nineteen (19) north of range four (4) west;

Also the undivided one-half ($\frac{1}{2}$) of all the ground occupied by the mill pond situated partly on the last mentioned tract of land and on part of the southwest quarter of said section thirty-two (32) and on part of the west half of the southeast quarter of section twenty nine (29) and part of the west half of the southeast quarter of section twenty (20), all in township nineteen (19) north of range four (4) west.

Also the undivided one-half ($\frac{1}{2}$) of the land and privileges of the water of said Sugar Creek purchased by Isaac C. Elston of Abraham Horner as specified in a deed executed by said Horner and others to the said Elston on the fourth day of November, 1840, and recorded in Deed Record 9, pages 158 and 159 in the Recorder's Office of Montgomery County, Indiana, and also the undivided one-half ($\frac{1}{2}$) of the water privileges purchased of the Messrs. Stover by said Elston, as specified in said deed executed by them to said Elston,

on the 19th day of April, 1842, and recorded in Deed Record 10, pages 153 and 154, in the Recorder's Office of said County; also the land occupied by the millrace connecting said mill pond with the flouring mill situate on said lands, said race passing through part of the east half of the northeast quarter of section thirty-one (31) and through part of the west half of the northwest quarter of section thirty-two (32), township and range aforesaid, all situate in the county of Montgomery and State of Indiana.

148 Also the ground necessary to widen said race so as to use the water in the most advantageous manner for driving machinery.

Also: Part of the east half of the northeast quarter of section thirty-one (31) township nineteen (19) north, range four (4) west, and bounded as follows: Beginning at a stone six hundred twenty-five (625) feet west of the southeast corner of said quarter section, and running thence north 2 degrees 45' east five hundred fifty-two and one-half (552½) feet; thence north 11 degrees 15' east four hundred thirty (430) feet; thence north 42 degrees 45' west three hundred sixty (360) feet; thence south 31½ degrees west four hundred sixty (46-) feet; thence south 20½ degrees west ninety-six (96) feet; thence south 9 degrees 25' west eight hundred ninety-five (895) feet; thence north 87 degrees east five hundred fifty-one (551) feet to the place of beginning, containing twelve and one-half (12½) acres more or less.

Excepting from the above description the following: Beginning at the aforesaid starting point and running thence north 2 degrees 45' east four (4) chains and eighty-two (82) links; thence west parallel with the south line of said tract to the west line; thence south 9 degrees 25' west four (4) chains eighty-two and one-half (82½) links to the southwest corner of said tract of land; thence north 87 degrees east five hundred fifty-one (551) feet to the place of the beginning point, which exception contains four (4) acres more or less, and the tract conveyed contains eight and one-half (8½) acres more or less,

all of which lands your orator shows are covered by said mortgage or deed of trust.

That this cross complainant, on the 25th day of May, 1906, within ten days after the execution thereof, caused said mortgage or deed of trust to be duly recorded in the offices of the respective recorders of Marion, Hendricks, Boone, Fountain, Warren, Vermillion and Montgomery counties, Indiana, and that the same was so recorded and indexed in the proper records of each of said counties in the respective records and at the respective pages stated in the respective certificates of said several county recorders, attached to or

149 endorsed upon said mortgage or deed of trust as shown on the copy thereof which is herewith filed, made part hereof, and marked "Exhibit A." That at the time of the execution of said mortgage or deed of trust and the recording thereof as aforesaid said defendant Traction Company resided in and had its principal office in Marion County, Indiana.

VIII.

Your orator further shows unto your Honors that under and pursuant to the terms of said mortgage of deed of trust, and pursuant to the full power and authority theretofore given, and being fully authorized in that behalf said defendant Traction Company issued and caused to be issued and duly executed by its proper officers fifteen hundred (1500) bonds of the denomination of One thousand dollars, (\$1,000) each, dated March 1, 1906, payable July 1st, 1936, aggregating in all One Million five hundred thousand (\$1,500,000) Dollars par value payable in gold coin of the United States of the then present standard of weight and fineness, at the office of the Van Norden Trust Company in the city of New York, with five per cent (5%) interest, payable in like coin at the rate of five per cent (5%) per annum on the first days of January and July in each year, upon the presentation of the proper coupons at the time and place mentioned, said bonds being payable to bearer or if registered then to the registered holder thereof.

All of said bonds so issued were duly certified by your orator as Trustee, and were duly sold, and are now outstanding and unpaid; that all of said bonds are of like tenor and a copy thereof with form of coupon attached is herewith filed, made part hereof, and marked Exhibit "B."

IX.

Your orator further shows unto your Honors that among the provisions and conditions of said mortgage or deed of trust is one described therein as "Section 1, of Article 6," which is of the following tenor:

"SECTION 1, ARTICLE 6. Whenever any default shall be made by the Traction Company in the payment of any interest moneys secured hereby and such default shall continue for six months the Trustee shall upon request of the holders of a majority of the bonds then outstanding declare the whole principal sum secured by the said bonds to be due and payable, anything to the contrary herein contained notwithstanding."

That among the conditions of said outstanding bonds is one of the following tenor:

"But if the promisor shall make any default for six months in the payment of any interest hereon or on any bond of this issue the principal sum hereby secured shall become due and payable at any time thereafter while the interest remains in default, and that the election of a majority in interest all holders of the bonds secured by the indenture hereinafter mentioned and at the time outstanding."

Your orator further shows unto your Honors that default was in fact made in the payment when due of a portion of the interest coupons maturing January 1st, 1909, and that said default has ever since continued; and that default was made in the payment when due of all interest coupons maturing July 1st, 1909, amounting in the aggregate to \$37,500, which default still continues.

That on the 15th day of January, 1910, more than six months after the happening of said last mentioned default, the owners and holders of a majority of the outstanding bonds secured by said mortgage exercised the option and right of election so conferred by said Section 1 of Article 6 of said mortgage or deed of trust, and by said provision of said bonds last above quoted, and requested your orator as Trustee to declare the whole principal sum secured by said outstanding bonds and by said mortgage or deed of trust to be due and payable.

And immediately upon receiving said request, which was in writing, your orator in compliance therewith and pursuant to the authority of said Section 1 of Article 6 of said mortgage or deed of trust, did declare said entire volume of outstanding bonds to be due and payable, and notified said defendant Traction Company in writing thereof, and demanded immediate payment of said entire indebtedness evidenced by said bonds and secured by said deed of trust together with accrued interest; but that said defendant Traction Company has wholly failed and refused to pay said bonds or any part thereof; and that said entire issue of \$1,500,000 and accrued interest, including said coupons so defaulted is now past due and wholly unpaid.

X.

Your orator further shows unto your Honors that said
152 defendant Traction Company is wholly insolvent and was insolvent at the time said original bill of complaint was filed herein; that it was then and has ever since continued to be unable to meet its obligations as they mature; that by the order appointing said receiver the insolvency of said defendant Traction Company was adjudged and, that it is necessary for the protection of the rights of the bondholders secured by said mortgage or deed of trust to your orator as trustee and for the protection of others interested in the property of said Traction Company that said receivership should be continued; that the assets of said insolvent Traction Company shall be marshaled that the rights of your orator as trustee and of the bondholders secured by this said mortgage or deed of trust shall be ascertained according to their respective equities and priorities, and accordingly adjudicated and decreed; that said defendant's said railroad shall be operated as a going concern in order that its value may not be sacrificed and its business lost and the rights of said defendant's creditors further prejudiced; and that finally all the property of said defendant corporation shall be sold and the proceeds after the payment of the costs and charges of this litigation properly chargeable thereto be distributed in accordance with equity.

XI.

Your orator further shows unto your Honors that said Allis-Chalmers Company, which is a corporation organized and
153 existing under and by virtue of the laws of the State of New Jersey, said Sinker-Davis Company, which is a corporation

organized and existing under the laws of the State of Indiana, said Morton L. Jamison, John S. Brown, and said Moore-Mansfield Company are each claiming an interest in and lien upon the property of said defendant Traction Company above described by virtue of certain alleged mechanics' liens for labor done and materials furnished by said respective parties; that your orator is not sufficiently advised to enable it to state with certainty what amount if any is owing either of said alleged lienholders from said defendant Traction Company, but your orator avers as to each and all of said alleged liens that the same are wholly without foundation either in law or in equity, and that if said parties or either of them is in fact the holder of any lien against said property of said defendant Traction Company, then the same is junior and inferior to the lien of your orator as trustee under said mortgage or deed of trust and junior and inferior to the rights of the bondholders secured thereby; and that each of said alleged lien holders is a necessary party defendant to your orator's cross bill of complaint.

XII.

Your orator further shows unto your Honors that heretofore, to-wit: on the 24th day of September, 1909, said Sinker-Davis Company filed an intervening petition in this cause wherein it alleges among other things that said defendant Traction Company
154 is indebted to it in the sum of \$630, evidenced by a bill of particulars filed with and made a part of said intervening petition and marked "Exhibit A," that the same is for work and labor done and material furnished said defendant Traction Company while in operation of its railroad; that within thirty days after the same was so furnished said intervenor filed a notice of its intention to hold a lien upon the property of said defendant now in the hands of said receiver, a copy of which notice is filed with and made a part of said petition and marked "Exhibit B"; that by said intervening petition said The Sinker-Davis Company prayed among other things that said claim together with interest and attorneys' fees thereon be allowed as a preferred claim and declared a lien against the property of said defendant Traction Company.

XIII.

Your orator further shows unto your Honors that on the 15th day of December, 1909, said Edward Hawkins, Albert A. Barnes, Andrew E. Reynolds, Alansen A. Hewes, Chas. N. Van Cleave, Sterling R. Holt, Ezra C. Voris and Peter C. Summerville filed an intervening petition in said cause wherein they pray among other things that said receiver, Harry J. Milligan, be ordered and directed to pay out of the income and earnings of said interurban railroad now or hereafter to come into his hands as such receiver the sum of \$12,500 with interest thereon to the American National Bank of Indianapolis, Indiana, in discharge of certain indebtedness alleged by said

155 last named intervenors to be owing to said bank by said defendant Traction Company and for which said intervenors have become liable to said bank upon notes executed by them individually to procure funds for the benefit of said defendant Traction Company, while said intervenors, as alleged in their said petition were managing the financial affairs of said Traction Company under and by virtue of certain contracts filed with and made a part of the intervening petition; that by reason of the facts alleged in said intervening petition said intervenors are asserting that said indebtedness to said American National Bank is a charge upon the funds in the hands of said Receiver paramount and senior to the rights of, and including your orator, as Trustee, and the bondholders secured by its said deed of trust and pray, among other things, that said Receiver be ordered, out of said funds belonging to said trust, to pay said indebtedness to said bank; but your orator avers that the rights of said intervenors, if any they have, are junior and inferior to those of your orator, as Trustee, under said mortgage or deed of trust not only as to the corpus of said property but as to all incomes, earnings and revenues derived therefrom, and any and all funds in the hands of said Receiver.

XIV.

Your orator shows unto your Honors that said William A. Guthrie on the 28th day of June, 1909, recovered a judgment in the Circuit Court of Hancock County, Indiana, for the sum of \$2,085.33 against said defendant Traction Company, and thereafter
156 caused a transcript thereof to be filed in Hendricks County, Indiana, which judgment is, as your orator is advised, still unpaid and constitutes an apparent lien upon the property of said defendant Traction Company, and a cloud upon the title thereof; that the rights of said judgment plaintiff, if any he has, are junior and inferior to the lien of your orator under said mortgage or deed of trust and of the bondholders secured thereby.

XV.

Your orator further shows unto your Honors that said pretended mechanic's lien sought to be asserted and enforced by said Sinker Davis Company, as alleged in paragraph twelve of this bill is wholly without validity, force or effect, either in law or in equity, as your orator is advised; and that if said Sinker Davis Company has in fact any lien against said Traction Company's property in the hands of said Receiver, either the corpus thereof, or the earnings, incomes, rights or assets of every kind or character, the same is junior and inferior in equity to the lien of your orator, as Trustee under its said mortgage or deed of trust, and junior and inferior to the rights of the bondholders secured by said mortgage or deed of trust.

XVI.

Your orator further shows unto your Honors that each of said 1500 bonds is of the par value of \$1,000 and of the aggregate par

value of \$1,500,000, is now outstanding and is an existing
157 valid obligation of said defendant Traction Company secured
by said mortgage or deed of trust; that each and every one
of said bonds was sold by said Traction Company after the same
were properly authenticated by your orator, as Trustee, for full value
to bona fide purchasers thereof for the purpose of procuring funds
to be used, and which were so procured and used in the construction
of the line of railroad of said defendant Traction Company from said
city of Indianapolis to said city of Crawfordsville, and in equipping
the same, all as contemplated by said deed of trust; which line of
railroad so constructed and equipped is now in the hands of said
Receiver and operated by him under the order and direction of this
Honorable Court.

XVII.

Your orator further shows unto your Honors that the corpus of
said defendant Traction Company's said railroad, including its right
of way, grade, tracks, rolling stock, franchises, and all property ap-
purtenant thereto, is insufficient in value to fully protect said bond
holders, and your orator, as trustee, being worth far less than the
par value of said outstanding bonds with accrued interest; and that
any and all funds that may now be in the hands of said Receiver,
or which have come into his hands since his appointment, are, as
your orator is informed and believes upon such information and
belief avers not more than sufficient to pay operating expenses and
the costs, expenses and charges of said Receivership; that all of said
funds have been earned and accumulated since default was
158 made in the payment of interest on the bonds secured by
your orator's said mortgage and that any and all such funds
in the hands of said Receiver, or that may hereafter come into his
hands as such Receiver from any source whatever, are subject to
the first and prior lien of your orator as trustee, and to the rights of
said bondholders secured thereby.

XVIII.

Your orator further shows unto your Honors that on and prior
to the 6th day of October, 1905, said defendant Consolidated Traction
Company, which is a corporation organized and existing under
the laws of the State of Indiana, had acquired and was then the
owner of certain contracts, franchises and privileges with the Indian-
apolis Traction and Terminal Company of the city of Indianapolis,
Indiana, the towns of Brownsburg, Lizton, Jamestown, New Ross,
the city of Crawfordsville and other towns in said State of Indiana,
and had surveyed and established a line of railroad from said city
of Indianapolis through the towns of Brownsburg, Lizton, James-
town and New Ross to said City of Crawfordsville, and had procured
a private right of way by purchase in fee simple, fifty feet wide, more
or less, from said City of Indianapolis to said city of Crawfordsville,
and between and connecting said towns of Brownsburg, Lizton,
Jamestown, New Ross and the city of Crawfordsville, and had con-
structed the grade for its tracks for nearly the entire distance from

said city of Indianapolis to said city of Crawfordsville, and had made other surveys and established other lines for its said railroad from the city of Crawfordsville west towards its terminus at the State line, and has at great expense procured reports, prospectuses, maps and blue prints for the whole of its lines from said city of Indianapolis to said State line, together with complete grading and specifications for the construction of its line from said city of Indianapolis to said city of Crawfordsville, including the construction of its power house and sub-stations, and had acquired other properties, rights and privileges pertaining to the construction, equipment and operation of its said railroad.

That on the 6th day of October, 1905, said defendant Consolidated Traction Company entered into an agreement in writing with the Indianapolis, Crawfordsville & Western Traction Company, a copy of which is herewith filed, made part hereof and marked Exhibit "C," whereby said Consolidated Traction Company for a full and valuable consideration, sold, transferred and delivered to said defendant, Indianapolis, Crawfordsville & Western Traction Company:

"All and singular the rights, privileges, contracts, franchises, real estate, rights of way, road-bed, writings, prospectuses, reports, drawings, specifications, owned and possessed, by the Consolidated Traction Company, free from debt and encumbrances, except moneys in hand, due or owing, personal property, and its capital stock and stock subscriptions,"

and agreed to execute all necessary deeds of conveyance and instruments of assignment necessary to vest the absolute title to said property legal and equitable in said Indianapolis, Crawfordsville & Western Traction Company.

Your orator further shows unto your Honors that said Indianapolis, Crawfordsville & Western Traction Company entered upon and took possession of all of the property, rights, privileges and franchises so acquired by the terms of said contract and constructed and completed its line of railroad thereon, and thereupon, from a point in the city of Indianapolis in the center of Michigan Street; thence north and west to the city limits of said city of Indianapolis, and thence to and into the city of Crawfordsville, as aforesaid, which entire line of railroad, and all other property of every kind and description, acquired by said contract, are covered by and subject to said deed of trust, and all the conditions thereof.

Your orator further avers that the full consideration agreed to be paid to the said Consolidated Traction Company was paid to and received by it at the time said contract was executed, and that said Consolidated Traction Company has no interest in any of the property hereinbefore described whatever.

Your orator further shows that no deed of conveyance appears of record, nor other instruments, transfers or conveyances of assignment to said Indianapolis, Crawfordsville & Western Traction Company from said Consolidated Traction Company, and your orator

is advised that no such conveyance or instrument of assignment was ever executed.

XIX.

For as much therefore as your orator is remediless in the premises by the rules of the common law and can have adequate relief only in a court of equity where actions of this nature are properly
161 cognizable, and to the end that all the defendants to this cross bill of complaint may, if they can show why your orator should not have the relief hereby prayed, your orator humbly prays that said defendants: Indianapolis, Crawfordsville & Western Traction Company, Electrical Installation Company, The Moore-Mansfield Construction Company, Allis-Chalmers Company, William A. Guthrie, the Sinkers-Davis Company, Morton L. Jamison, George Shelley, John S. Brown, Edward Hawkins, Albert A. Barnes, Andrew E. Reynolds, Alansen A. Hewes, Charles N. Van Cleave, Sterling R. Holt, Peter C. Sommerville, Ezra C. Voris, and Harry J. Milligan, as Receiver of said Indianapolis, Crawfordsville & Western Traction Company and said Consolidated Traction Company be made defendants to this your orator's cross-bill of complaint.

That a writ of subpoena of the United States of America be granted unto your orator to be issued out of this Honorable Court and directed to each of said persons and corporations so named as defendants to this cross-bill of complaint, thereby commanding them, and each of them at the next rule day of this Honorable Court personally to be and appear before said Court in the City of Indianapolis in the State of Indiana, and in said District, then and there to answer this, your orator's said bill of complaint, but not under oath (answer under oath being hereby expressly waived), and to stand to and abide by the order and decree of this Honorable Court in the premises.

And your orator further humbly prays that each of said defendants to said cross-bill of complaint shall be ordered to make
162 said answer hereunto according to their best knowledge, information and belief as to all matters aforesaid, as fully in every respect as if the same were here and again repeated and they hereunto particularly interrogated.

That during the pendency of this suit the Receivership heretofore created in said original cause be continued and extended to and made incident to this your orator's said cross-bill of complaint; that said Receiver shall take and hold possession of all the property described in said mortgage or deed of trust to your orator, as trustee, and all and singular the rights, contracts, franchises, earnings, incomes and assets of every name and nature owned or acquired by said defendant Traction Company at the time of the making of said mortgage or deed of trust, or thereafter; that said Receiver shall also take and hold possession of all the books, papers and fixtures pertaining to said business of the defendant Traction Company with full power and authority to carry on said business and operate the same with all of the usual powers and duties of receivers in such cases, and with authority to proceed by suit or otherwise to recover

all property now in the hands of other persons belonging to said defendant, and all moneys, justly due it and lawfully withheld by any person or corporation; that an account be taken on this behalf by and under the direction of this Honorable Court to ascertain the amount due your orator as trustee for the principal and interest of said bonds, together with all your orator's outlays, fees, commissions, compensations and disbursements for any of the purposes authorized by said deed of trust during the pendency of this suit or otherwise, including a reasonable sum for solicitor's fees incurred by your orator in these proceedings, and a reasonable compensation to your orator for its services as trustee under said mortgage or deed of trust; that the amount so found to be due may be found adjudged and decreed to be a first lien upon the property mentioned in said mortgage or deed of trust to your orator, and all property subsequently acquired by said defendant Traction Company, together with all funds in the hands of said Receiver from whatever source derived for the account and benefit of your orator, as trustee, and of the bondholders of said bonds secured thereby, and that the rights of your orator and the holders of the bonds secured by said mortgage or deed of trust, with reference to the property, assets, interests, rights, franchises, earnings and incomes of said defendant Traction Company at any time in the possession or control of said Receiver may be declared to be the same as if said Receiver had been appointed originally upon the application of your orator.

And your orator further humbly prays its said mortgage or deed of trust may be foreclosed as against each and every one of said defendants; that all of the railroad property, interests, rights and franchises of said defendant, Indianapolis, Crawfordsville & Western Traction Company, and in the custody of its said Receiver, or otherwise, may be sold in solido under a single decree of this Honorable Court, and by a Master appointed herein to make said

164 sale for the satisfaction of the bonds secured by said mortgage or deed of trust to your orator as Trustee; that by said sale said property shall be sold free and clear of the lien or liens, of any and all of said defendants to this cross-bill of complaint, if any, and also free and clear of the lien of said mortgage or deed of trust in favor of your orator as Trustee, and free and clear of each and every other lien or incumbrance held or claimed by or in favor of any party to this action; and that at such sale all of said property shall be sold absolutely and without the right of redemption therefrom; that said Master be ordered to execute all proper deeds or other instruments sufficient to vest in the purchaser complete title to all the property so sold including any interest in law or in equity had or claimed by any of said defendants.

That the proceeds of any such sale, whether made under this cross-bill of complaint by Master, or otherwise, or under said original bill of complaint filed herein, shall be applied:

1. To the payment of any costs, expenses, fees and other charges incurred in this action, including a reasonable compensation to your orator, its agents and solicitors herein, and to the payment of all

expenses and liabilities incurred and advances made by your orator for any of the purposes specified in said deed of trust.

2. Any surplus then remaining to be next applied to the payment of the whole amount due and unpaid the principal and interest of the outstanding bonds secured by said mortgage or deed of trust to your orator, and if the proceeds should be insufficient to pay the whole amount so due, then to the payment of such principal and interest ratably according to the aggregate amount of such principal and the accrued and unpaid interest without preference or priority of principal over interest or interest over principal.

3. If any surplus shall thereafter remain the same to be paid to whomsoever the Court may determine to be entitled thereto.

Your orator further humbly prays that upon the sale of said mortgaged property the Court may in its order of sale provide and require to be paid in cash by the purchaser thereof such a sum or sums as shall be necessary to cover the costs and expenses of the sale, and all of the proceeds incident thereto, and all other charges and costs that may by the Court be decreed to be paid in cash, and that the court may direct that any of the bonds or coupons issued under said mortgage or deed of trust, and entitled to participate in the proceeds of such foreclosure sale may be appropriated and used toward the payment of the purchase price, reckoning each bond or coupon so appropriated and used at such sum as shall be payable thereon out of the proceeds of said sale, and that the proper receipts may be given to the various holders of such bonds or coupons for the amount so payable thereon, and the said bonds and coupons, if the net proceeds of said sale shall be sufficient to pay them in full, shall be delivered to the officer of this Court making said sale for cancellation; that a judgment for the amount of any deficiency at such sale shall be entered against the defendant Traction Company; that said defendants may be forever barred and foreclosed to and from all right, title, interest in or equity of redemption of any right to said mortgaged property, franchises or assets, ordered by said decree to be sold. And your orator further prays that the Court may grant such other and further relief in the premises as the circumstances of this case may require, and as may be agreeable to equity and good conscience.

And your orator will ever pray.

THE MARION TRUST COMPANY,
By HUGH DOUGHERTY, *President*,
WHITTINGTON & WILLIAMS,
MILLER, SHIRLEY & MILLER,
Solicitors for said Cross-complainant.

167 UNITED STATES OF AMERICA,
State of Indiana, Marion County, ss:

Hugh Dougherty being first duly sworn upon his oath says, that he is the President of The Marion Trust Company, Trustee, the cross-complainant in the foregoing cross-bill of complaint; that he is duly authorized by said cross-complainant to make this affida-

vit in its behalf; that he has read the foregoing cross-bill of complaint and knows the contents thereof, and that the same are true in so far as this affiant has personal knowledge thereof, and that as to all other matters alleged therein this affiant is informed and believes said matters to be true.

HUGH DOUGHERTY.

Subscribed and sworn to before me this 29 day of January, 1910.

[SEAL.]

LON A. ROBERTSON,

Notary Public, Notary Public, Marion Co., Ind.

My commission expires Nov. 25, 1912.

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(EXHIBIT "A.")

Mortgage, Indianapolis, Crawfordsville and Western Traction Company to The Marion Trust Company of Indianapolis.

This indenture, made this Twenty-first day of May, in the year nineteen hundred and six, between the Indianapolis, Crawfordsville and Western Traction Company, incorporated under the laws of Indiana, (hereinafter called the Traction Company), of the one part and The Marion Trust Company, of Indianapolis, Indiana, (hereinafter called the Trustee), of the other part, witnesseth:

Whereas, The Traction Company was duly incorporated under the laws of Indiana for the purpose of constructing, owning and maintaining a system of railroads, switches and side tracks in, through and between certain cities and towns within the said State of Indiana specified in its Articles of Association, and has duly resolved by vote of its directors and stockholders to borrow money in such amounts as shall be necessary to acquire, construct, complete and equip its railroad and discharge obligations incurred therefor, and to issue and dispose of its bonds for the amounts so borrowed to the total aggregate principal amount of not exceeding three million dollars (\$3,000,000) under and subject to the terms and conditions hereinafter specified, and to mortgage its property and franchises to secure the said bonds; and

Whereas, The said bonds are to be of the par value of one thousand dollars (\$1,000) each, and are to be numbered from one (1) to three thousand (3,000), both inclusive, and with the interest coupons attached thereto, (which shall be signed by the engraved facsimile signature of the treasurer of said Traction Company) and the certificate of the Trustee thereon are to be substantially in the following form, to wit:

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Indianapolis, Crawfordsville and Western Traction Company.

First Mortgage 5 per Cent Gold Bond.

No.

\$1,000.

Be it known that the Indianapolis, Crawfordsville and Western Traction Company, incorporated under the laws of Indiana, for

value received, promises to pay to the bearer hereof, or if this bond shall be registered, then to the holder hereof registered according to the provisions hereinafter contained, without relief from valuation or appraisement laws, the sum of one thousand dollars in gold coin of the United States of the present standard of weight and fineness, at the office of the Van Norden Trust Company, in the City of New York, on the first day of July, 1936, and also to pay interest thereon in like coin at the rate of five per cent per annum on the first days of January and July in each year to the bearer of the respective coupons for such interest hereto annexed, upon presentation thereof at the time and place therein mentioned; each of which coupons is for six months' interest on this bond, except the first, which is for the interest from the date of this bond to July 1, 1906. But if the promisor shall make any default for six months in the payment of any interest hereon, or on any bond of this issue, the principal sum hereby secured shall become due and payable at any time thereafter while the interest remains in default, at the election of a majority in interest of holders of the bonds secured by the indenture hereinafter mentioned at the time outstanding.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the promisor may be required to pay or retain therefrom under any present or future law of the United States or of the State of Indiana, or any county or municipality thereof.

This bond is one of a series of three thousand similar bonds, amounting in the aggregate to three million dollars, all of which are equally secured by an indenture of first mortgage, whereby all the property, real and personal, easements, rights, franchises and privileges, present and future, of the Indianapolis, Crawfordsville and Western Traction Company are mortgaged to The Marion Trust Company, of Indianapolis, Indiana, as trustee for the bondholders.

No recourse shall be had for the payment of the principal or interest of this bond against any stockholder, officer or director of the promisor, either directly or through the promisor, by virtue of any statute, or by enforcement of any assessment, or otherwise, and any and all personal liability of the officers, directors and stockholders of the promisor in respect of said bonds is hereby expressly waived and released by every holder hereof.

171 This bond, until registered, shall pass by delivery. This bond may be registered in books to be kept for that purpose at the office of the Trustee in the City of Indianapolis, and if so registered, will thereafter be transferable only upon the said books at the office of the Trustee by the owner in person, or by attorney, unless the last preceding registration shall have been to bearer, and the transfer by delivery thereby registered, and it shall continue to be susceptible of successive registrations and transfers at the option of the holder, but such registration shall not affect the negotiability of the annexed coupons.

This bond is valid only when The Marion Trust Company, of

Indianapolis, Indiana, has endorsed hereon a certificate that it is one of the bonds in the said indenture specified.

Witness the corporate seal of the Indianapolis, Crawfordsville and Western Traction Company and the signatures of its President and Secretary on its behalf the first day of March, in the year 1906.

[SEAL.] INDIANAPOLIS, CRAWFORDSVILLE AND
WESTERN TRACTION COMPANY,

By A. F. RAMSEY, *President*.

Attest:

EDWARD HAWKINS, *Secretary*.

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(Form of Coupon.)

\$25.00.

On the first day of January (July), 190—, the Indianapolis, Crawfordsville and Western Traction Company will pay the bearer twenty-five dollars in gold coin of the United States of the present standard of weight and fineness, at the office of the Van Norden Trust Company, in the City of New York, for six months' interest on its First Mortgage Bond No.—.

OLIVER P. ENSLEY, *Treasurer*.

(Trustee's Certificate.)

The Marion Trust Company, of Indianapolis, Indiana, hereby certifies that this bond is one of the series described in the within mentioned mortgage in the aggregate of three million dollars.

THE MARION TRUST COMPANY,

[SEAL.] By HUGH DOUGHERTY, *President*.

And whereas, All things necessary to make the said bonds when certified by the said Trustee as in these presents provided, valid, binding, legal and negotiable obligations of the said Traction Company, and these presents a valid mortgage to secure the pay-
173 ment of the said bonds, have been done and performed, and the creation and issue of the said bonds and mortgage have been in all respects duly authorized.

Now, therefore, this indenture witnesseth: That the Traction Company, in consideration of the premises and of one dollar to it in hand paid by the Trustee, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds aforesaid as the same shall become due, according to the tenor thereof, and the faithful performance of the covenants herein contained and in pursuance of the authority of every kind and nature which the said Traction Company has or may have, has granted, bargained, sold, conveyed, released, confirmed, warranted, assigned transferred and set over, and by these presents does grant, bargain, sell, convey, release, warrant, assign, transfer, and set over unto the Trustee and to its successor or successors in the trust hereby created, and to its assigns, all and singular the lines of railroad constructed and belonging to and in process of construc-

tion by the Traction Company, extending from and in the City of Indianapolis by way of the towns of Clermont, Brownsburg, Pittsboro, Rainstown, Lizton, Jamestown, New Ross and Mace to and in the city of Crawfordsville, and through and from said City by way of the towns of Wesley, Waynetown, Hillsboro and Veedersburg to, in and through the City of Covington, and in and through the counties of Marion, Hendricks, Boone, Montgomery, Fountain, Warren and Vermillion, in the State of Indiana, to the western boundary of the State of Indiana at a point east of the City of Danville, in the State of Illinois, and all branches and extensions which may hereafter be constructed or otherwise acquired by said Traction Company; and also all and singular the lands, rights of way, and real and leasehold estate, already, or hereafter to be, acquired by the Traction Company, and used or intended to be used for the said lines of railroad or otherwise; and also all and singular, the engines, cars, rolling stock, dynamos, equipment, machinery, tools, implements, materials, furniture, fuel, supplies, contracts, books, documents, choses in action, and other chattels, and personal estate belonging to, or hereafter to be acquired by, the Traction Company; and also all and singular the franchises, rights and privileges that the Traction Company now has, or may hereafter acquire, for, or in respect of the said railroad, or any branch or extension thereof, or the construction, maintenance, improvement, working, or use of the same, or otherwise, together with all stations, warehouses, power-houses, machine shops, bridges, structures, approaches, works, privileges, easements, and appurtenances to, or with, the said premises or any part thereof, now, or at any time during the continuance of this security, appertaining or enjoyed, and all other property, real and personal, rights, privileges, franchises, and easements of every kind and nature, whether now owned or hereafter acquired by the Traction Company, together with all rents, tolls, earnings, profits, revenues, or income, arising or to arise from the property or any part thereof hereby mortgaged, and whether the same be now owned or hereafter acquired. To have and to hold the said premises hereinbefore expressed to be hereby granted unto and to the use of the Trustee and its successors and assigns forever, upon and for the trusts and purposes hereinafter expressed of and concerning the same.

Article I.

1. The aggregate principal amount of all bonds which may be issued and outstanding under this indenture shall not exceed three million dollars (\$3,000,000) par value, and they shall be dated as of March 1st, 1906, and be payable July 1st, 1936, and shall be executed by the Traction Company and delivered to the Trustee to be certified as hereinafter provided, to-wit:

(a) One thousand, five hundred of the said bonds (numbered from 1 to 1,500, both inclusive), amounting at par to \$1,500,000, shall be at once certified by said Trustee and delivered to the Treasurer, or such other officer of the Traction Company as shall be desig-

nated to receive the same by resolution of the Board of Directors of the Traction Company, in which resolution it shall be stated that said bonds, or the proceeds thereof, are required, and will be used by the Company, to purchase, construct and otherwise acquire, and equip and put in operation (including all necessary expenditures to that time), that part of the railroad of said Traction Company, extending from Indianapolis, in Marion County, to Crawfordsville, in Montgomery County, Indiana.

176 (b) The remaining one thousand, five hundred of said bonds (numbered from 1,501 to 3,000, both inclusive), amounting at par to \$1,500,000, shall, prior to the completion, equipment and putting in operation of the entire railroad of the Traction Company from Indianapolis to the western boundary of the State of Indiana, be certified by the Trustee only for the purpose of paying for the construction and equipment of that part of the railroad of the Traction Company between the City of Crawfordsville and the western boundary of the State of Indiana, for which purpose said bonds, or the proceeds thereof and any of the bonds described in clause (a) hereof, or the proceeds thereof, which it has not been necessary to use for the purposes stated in said clause, shall be used; and before said bonds or any of them are so certified, the Traction Company, by resolution of its Board of Directors, shall request such certification and the delivery of the bonds to its Treasurer or other officer designated to receive the same, and state that such certification and delivery are required, and that the bonds certified, or the proceeds thereof, will be used, for the purpose stated in this clause.

177 (c) After the completion of said road from Indianapolis to the western boundary of the State of Indiana, the bonds, if any, remaining uncertified, shall be certified by the Trustee only for the purpose of paying for permanent improvements to the railroad of said Traction Company, and for the purpose of paying for extensions and branches of said railroad system purchased, or otherwise acquired or constructed, and for the purpose of paying for equipment and permanent improvement of such extensions and branches, and not until such improvements, extensions, branches, or equipment have been actually made or acquired, or are about to be made or acquired, and the said bonds mentioned in this sub-section (c) shall be certified by the Trustee from time to time, and delivered as and when requested in writing by the president and treasurer of the Traction Company upon receiving certified copies of resolutions of the directors of the Traction Company requesting the certification and delivery of such bonds, and stating that the proceeds thereof are applicable and necessary to pay for such improvements, extensions, branches, or equipments at that time actually made, or acquired, or about to be made or acquired, and that the proceeds of all the bonds mentioned in sub-section (a) and (b), and of all the bonds mentioned in this sub-section (c), previously certified and delivered, had been expended as in said sub-sections provided.

The receipt by the Trustee of a certified copy of a resolution of the Board of Directors of the Traction Company, calling for the certification and delivery of bonds under the terms of said sub-

sections (a), (b) and (c), and stating the facts required to
178 be shown, as herein provided in said sub-sections, shall
furnish sufficient and complete authority to the Trustee for
its certification of the bonds called for by such resolution for the
uses and purposes specified in said sub-sections respectively.

2. None of the bonds issued hereunder and intended to be secured
hereby shall be obligatory for any purpose or entitled to the benefit
of these presents unless the certificate endorsed thereon shall have
been signed by the Trustee.

Article II.

The Traction Company covenants and agrees that it will, on or
before October 1st, 1912, and on or before October 1st in each year
thereafter, while any of the bonds secured by this mortgage are out-
standing, deposit with the Trustee, for the purpose of a sinking fund
for said bonds, a sum equal to one-half ($\frac{1}{2}$) of one per centum, of
the aggregate amount, par value, of all bonds secured hereby out-
standing at the time of such deposit, and which have been outstand-
ing for at least five years prior thereto, which said amount shall be
invested in so many of the bonds issued hereunder as the Trustee
shall be able to purchase in the market at the price of not exceeding
one hundred and five (105) per centum, and accrued interest, prefer-
ence to be given by the Trustee to the bonds offered at the lowest
price, after such advertisement, if any, as the Trustee shall
179 think proper, and if the Trustee shall have been unable,
prior to November 1st in any year, to invest all of said funds
in bonds issued hereunder and secured hereby at not exceeding 105
per centum and accrued interest, then it shall be the duty of the
Trustee to invest the funds remaining in its hands in bonds or other
securities authorized by the Laws of Massachusetts regulating the
investment of the funds of Savings Banks. And if thereafter in
any year while any part of the sinking fund is so invested, bonds
issued hereunder and secured hereby are offered for sale to the
Trustee, or may be purchased in the market at the rate aforesaid,
in excess of the amount purchased or purchasable by the sinking
fund payment for the current year, the Trustee may, and if re-
quested in writing by the Traction Company shall, sell such other
bonds or other securities, or such thereof as the Trustee may select,
to such an amount as will enable the Trustee to purchase the bonds
so offered for sale or purchasable in the market, and such purchase
shall thereupon be made at not exceeding the price aforesaid, prefer-
ence in purchase being given to bonds offered at the lowest price, and
instead of selling bonds or other securities, the same may be ex-
changed for bonds issued hereunder and secured hereby at the rate
and upon the other terms and conditions aforesaid.

Provided, however, That no such sale and purchase or exchange
shall be made, which, taking into consideration the cost to the sink-
ing fund of the bonds or other securities sold or exchanged, and
the amount realized therefor in case of sale, and the market
180 value thereof in case of exchange, shall make the cost to
the sinking fund of any of the bonds acquired by such sale

or exchange more than 105 per centum of the par value thereof and accrued interest.

The Trustee shall also have power to convert the bonds or other securities, other than the bonds hereunder and secured hereby, in which any part of the sinking fund may be invested, into other bonds or securities of the class authorized by the Laws of Massachusetts for the investment of the funds of Savings Banks, whenever in the opinion of the Trustee it will be of benefit to the trust estate and the holders of the bonds issued hereunder and secured hereby to do so. Such conversion may be by sale and reinvestment of the proceeds, or by exchange.

All bonds, and the coupons annexed thereto issued hereunder and secured hereby, which shall be purchased or otherwise acquired by funds or property belonging to the sinking fund hereby created, shall be immediately cancelled, and the Trustee shall enter satisfaction pro tanto upon the record of this mortgage in the various counties of Indiana where the same may be recorded.

Article III.

1. Until default shall be made in the payment of the principal or interest, or any part thereof, payable upon the bonds hereby secured as the same shall respectively become due and payable, or
181 in the performance of the covenants herein contained to be performed by the Traction Company, the Traction Company shall be suffered and permitted to remain in full possession, enjoyment and control of all the franchises, privileges and property, real and personal, herein expressed to be hereby mortgaged, and shall be permitted to manage the same and to receive, receipt for, take, use, enjoy, and dispose of the rents, tolls, profits, revenues and income thereof, and to do all things necessary or incident to the proper management of the business of the Traction Company. The Traction Company, not being in default in respect of any covenant or agreement hereof, may, with the consent of the Trustee, dispose of or give up any franchise, grant or privilege, or any easement for right of way or part thereof, which is no longer useful or needed for the purpose of its business, provided the security hereby created is not impaired, and the Trustee may thereupon release the same from the lien of this mortgage without incurring any liability on account thereof. The Traction Company may also, with the consent of the Trustee, procure or assent to modifications or amendments to any franchise, grant or privilege used in connection with the property hereby mortgaged by which the security hereby created is not impaired, and such franchise, grant or privilege as so modified or amended shall thereupon come under and be subject to the
182 lien of this mortgage, and in granting any release the Trustee may rely absolutely on the truth of the facts stated in a resolution of the Board of Directors of the Traction Company and verified by the certificate of the president or such other officer of the Traction Company as the Trustee shall select, and the Trustee may,

in its discretion, require such other evidence as to such facts as to it may seem appropriate.

2. Whenever the Traction Company shall not be in default, in respect of any covenant or agreement hereof, it may sell and dispose of any of its machinery, apparatus, or equipment, or lands, real or leasehold estate, that may become worn out or no longer useful for the purpose of its business and replace the same with other property of equal value useful for its business, or pay the proceeds thereof to the Trustee, and when such replacements or payments shall have been fully made the Trustee shall release the property so sold from the lien of these presents, and no purchaser in good faith shall be bound to ascertain the authority of the Trustee to execute any such release or to inquire as to any facts required for the exercise of such authority, and the proceeds so received by the Trustee shall, so long as the Traction Company shall not be in default as aforesaid, be applicable to the purchase of other property useful in the Traction Company's business, to be vested in the Traction Company and the

Trustee under the lien hereof as a part of the trust premises,
183 and such money shall be paid out from time to time by the

Trustee upon the written declaration of the Board of Directors of the Traction Company that such property equal in value to the amount of money to be paid out has been vested as aforesaid, and the Trustee shall hold such proceeds until such application, upon similar terms to those upon which the Trustee for the time being receives money from other customers upon deposit, and, subject thereto, upon the same trusts as the property from which the same shall have arisen would have been subject to. In granting any release or in making any payment as hereinbefore provided for, the Trustee may rely absolutely on the truth of any facts stated in a resolution of the Board of Directors and verified by the certificate of the president, or such other officer of the Traction Company as the Trustee shall select, and the Trustee may, in its discretion, require such other evidence as to such facts as to it may seem appropriate, and the Trustee may assume that the Traction Company is not in default for the purpose of making such releases and payment unless it has knowledge to the contrary.

Article IV.

The Traction Company, its successors and assigns, shall and will, upon demand in writing of the Trustee at any time, make, execute, acknowledge, and deliver all such further acts, deeds and as-
184 surances in law as may be reasonably advised or required of them, or either of them, effectuating the intention of these presents, and for the better assuring and confirming unto the Trustee, its successors and assigns, in the trusts hereby created, upon the trusts and for the purposes herein expressed, all and singular the property, appurtenances, rights and franchises hereby mortgaged, whether now owned or hereafter acquired by the Traction Company, its successors and assigns.

Article V.

1. The Traction Company covenants that it will pay, upon surrender of the bonds and the interest coupons thereto belonging, the principal of all the bonds issued under this mortgage, and the interest thereon when the same shall become due according to the terms thereof, in gold coin of the United States of the present standard of weight and fineness, without deduction from the principal or interest for any tax or taxes which the Traction Company may be required to pay, or to retain therefrom by any present or future law of the United States, or of the State of Indiana, or any county or municipality therein; that it will not, directly or indirectly, extend or consent to an extension of the time of payment of any coupons secured hereby, and will not, directly or indirectly, be a party to, or approve of, any such arrangements, by purchasing or funding said coupons,

185 or in any other manner, and in case the time for payment of any such coupons shall be so extended, whether or not such extension be by or with the consent of the Traction Company, such coupons shall not be entitled, in case of default hereunder, to the benefit of the security of this indenture, except subject to the prior payment in full of the principal of all bonds issued hereunder then outstanding, and of all matured coupons, the payment of which has not been so extended, and that, when and as the coupons attached to the said bonds shall be paid by the Traction Company they shall be canceled, and no purchase or sale of said coupons, or any of them, and no advance or loan thereon, nor redemption thereof, by or on behalf of, or at the request of the Traction Company, after the same shall have been detached from the bonds to which they belong, shall keep such coupons alive, or preserve their lien upon the mortgaged property or franchises; but nothing herein contained shall be intended or construed to prevent the Traction Company, by arrangement with the holder or holders of the bonds then outstanding, from extending the time of payment, or changing the rate of interest on any or all of the said bonds, and any such extended or changed bond, and the coupons thereon, if such be the terms of the agreement, shall retain all the benefits and protection of this mortgage to the same extent as if such extension or change had not been made.

186 2. The Traction Company further covenants with the Trustee, and for the benefit of the Trustee and of the several holders of the said bonds for the time being:

(a) That the Traction Company is lawfully seized and possessed of the mortgaged premises, that they are free and clear of all incumbrances, that the Traction Company has good right and lawful authority to sell and convey the same, and that the Traction Company will warrant and defend the same to the Trustee, its successors and assigns, for the benefit of the holders, for the time being, of the said bonds against the lawful claims and demands of all persons whomsoever.

(b) The Traction Company covenants that it will pay, or cause to be paid, all taxes, rates, levies, charges or assessments which are or

may be lawfully imposed, levied, or assessed by the United States or the State of Indiana, or any county or municipality or other authority, on the Traction Company, or on any of the property, real and personal, rights, privileges and franchises hereby conveyed, and that it will not hereafter suffer any lien superior to the lien hereby created to attach to said property, rights, privileges, or franchises, or any part thereof.

(c) The Traction Company covenants that if it shall be required by any franchise now owned, or hereafter acquired, to pave
187 any portion of any street or alley in any city or town, it will not request any extension of time to pay for the said improvement or improvements, and that it will not request any bonds of any city or town to be issued in respect of any such paving, the lien of which might become prior to the lien of the bonds of the Traction Company secured hereby, and that it will do all paving which it may be required by any franchise to do, at such time or times, and in such manner as to prevent the issue of any such bonds of any such city or town.

(d) That it will keep and maintain the property hereby mortgaged in good condition and repair, and that it will keep all its lines of railroad, power-stations, apparatus, fixtures and appurtenances in like repair and good working order and supplied with all necessary and proper equipment and supplies; from time to time will make from its earnings all needful and proper repairs, renewals, replacements, and alterations, and will conduct its business and work its railway without interruption in a reasonably efficient manner, and will not suffer any of its licenses to exercise or use patents, or patent rights, or apparatus, or its right, privileges, or franchises, to lapse or be forfeited so long as the same shall be necessary or convenient in carrying on the business of the company, and will use reasonable efforts to obtain from time to time all necessary renewals
and extensions of such rights, privileges, franchises and li-
188 censes, and similar licenses and rights in respect of other patents, instruments, equipment and apparatus, the use of which may be necessary in the conduct of its business as the Traction Company shall be authorized to conduct it.

(e) That during the continuance of this security it will keep such of the property hereby conveyed as may be liable to injury or destruction by fire reasonably insured, and the policies therefor shall be payable to the Trustee in case of loss and be deposited with the Trustee, and all insurance moneys received by the Trustee from such policies shall be applied to the replacement, restoration or repair of such property as may have been injured or destroyed, or to the purchase of other property needed for the maintenance or operation of the said system of railroads or other operations and business of the Traction Company, and such replaced or restored property shall immediately become subject to the lien of this mortgage. All insurance moneys so received by the Trustee shall be paid out by it on the written order of the Treasurer of the Traction Company after receiving satisfactory proofs or assurances, either in the form of a resolution of the Board of Directors of the Traction

Company, or otherwise, as to the fair value of such repairs, replacements or additional property, and the desirability of making or acquiring the same; and in case such moneys shall not be
189 applied as above provided, they shall be held by the Trustee in the same manner and upon the same trusts as hereinbefore provided in case of purchase moneys received by the Trustee from the sale of equipment, furniture, machinery or other property. In case of the neglect or refusal of the Traction Company, its successors or assigns, thus to insure or to pay any such taxes, rates, levies, charges or assessments, the Trustee, or any bondholder, may procure and pay for such insurance and pay such taxes, rates, levies, charges or assessments, or purchase any outstanding certificates of sale thereunder, and all moneys so paid with interest thereon at six per cent. per annum, shall become a lien upon the property hereby conveyed prior to the lien of the bonds, and the Traction Company covenants that it will repay to the Trustee or any bondholder any moneys paid by it or him in accordance with the foregoing, with interest at the rate of six per cent. per annum.

(f) That in the event of any sale of the mortgaged premises, or any part thereof, under any power or trust herein contained, the Traction Company will, if and when required by the Trustee or the purchaser, execute a formal conveyance or assurance of the part of the said premises so sold to the Trustee, or as the Trustee may direct.

(g) That the Traction Company will pay to the Trustee all expenses incurred by the Trustee in the execution of the trusts
190 hereof, and all sums of money, if any, that shall have been paid by the Trustee or any persons interested in the trusts hereof on account of any such taxes, charges, assessments or liens or insurance moneys in case of any default in respect thereof on the part of the Traction Company, as aforesaid, with interest at the rate of six per cent. per annum from the time or times of such payments, respectively.

(h) That the Traction Company will duly record and file these presents as shall be required by law in order to preserve the lien of the same as a mortgage, both of real and of personal property, of all the mortgaged premises hereby conveyed or intended so to be, and will furnish satisfactory evidence of such recording and filing to the Trustee and will furnish similar evidence of filing and recording every additional instrument which shall be necessary to preserve the lien of these presents upon all property until the principal and interest of the bonds hereby secured shall have been duly paid.

(i) And that the Traction Company, after its railroad is in operation, will furnish to the Trustee quarterly statements showing in detail the receipts from operation and other sources, and expenses, which statements shall be available for examination in the office of the Trustee, by any bona fide bondholder, and will also furnish to the Trustee, whenever requested, not oftener than once

in each calendar year, a schedule of its property comprised
191 in these presents, and at all times afford the Trustee and its
agents full opportunity to inspect and examine all the mort-
gaged premises.

(j) And that the Traction Company will keep books for regis-
tration and transfer of the bonds at the office of the Trustee.

Article VI.

1. Whenever any default shall be made by the Traction Com-
pany in the payment of any interest moneys secured hereby, and
such default shall continue for six months, the Trustee shall, upon
request of the holders of a majority of the bonds then outstand-
ing, declare the whole principal sum secured by the said bonds to
be due and payable, anything to the contrary herein contained
notwithstanding.

2. In case the Traction Company shall make default in the pay-
ment of the principal of any one or more of the bonds hereby
secured, or intended so to be, according to the terms thereof, or
shall make default for six months in the performance of any of
the other covenants herein contained on its part to be performed,
or shall be dissolved, or go, or be put into bankruptcy or lose its
charter by forfeiture or otherwise, the security hereby constituted
shall become enforceable, and then and in every such case the
Traction Company, upon demand of the Trustee shall and will,

forthwith surrender to the Trustee the actual possession, and
192 the Trustee shall be entitled forthwith, with or without pro-
cess of law, to enter into and upon and take possession of
all and singular the property and premises hereby mortgaged, or
intended so to be, and each and every part thereof, and all records,
books, papers, and accounts of the Traction Company, and to ex-
clude the Traction Company and its agents and servants wholly
therefrom, and shall, without being responsible for loss or damage,
hold, use, manage and operate the same with the rights, privileges
and appurtenances thereto belonging, and may employ such super-
intendents, managers and operators thereof, and exercise the fran-
chises appertaining thereto, and make from time to time all repairs
and replacements and such additions, alterations, extensions and im-
provements thereof and thereto as may become necessary, or as to
the said Trustee may seem proper and judicious, and may collect
and receive all tolls, income, rent, issues and profits of the same
and every part thereof, and after deducting all expenses on account
of the maintenance, management and operation of said property,
and conducting the business thereof, and all repairs, replacements,
additions, alterations, extensions and improvements so made, and
all payments made for taxes, levies and assessments, insurance,
premiums, and other charges upon said property or any part thereof,
as well as just compensation for the services of the Trustee, its
agents, clerks, servants, attorneys and counsel, shall apply the re-
mainder of the moneys so received by it to the payment of the inter-
est in arrear or being due and payable on the said bonds, and the in-

193 terest, if any, accruing and unpaid upon the other debts and liabilities hereby secured in the order in which such interest shall have become due and payable, and in case the principal moneys evidenced by the bonds secured by this mortgage shall have become due, then to the payment ratably and without preference of such principal and the other debts and liabilities secured hereby, and in case all such payments shall be completely made and all defaults of the Traction Company shall have been made good before any foreclosure or sale, the Trustee shall restore possession of the mortgaged premises to the Traction Company, and the same shall, thenceforth, unless the principal of the bonds secured hereby has been paid, become subject to the provisions of these presents in the same manner as if such entry had not been made.

3. Whenever the security hereby constituted shall become enforceable, as provided in Section 2 of this Article, the Trustee may, and upon the request of the holders of one-fourth of the bonds at the time outstanding shall, either with entry as above provided, or without such entry, proceed to sell at public auction to the highest bidder all and singular the property and franchises hereby mortgaged which shall then be subject to the lien of this indenture, with the appurtenances and all benefit and equity of redemption of the Traction Company, its successors or assigns, therein. Such sale shall be made by the Trustee, or by its attorney or attorneys, agent or agents, in the City of Indianapolis, State of Indiana, after
194 notice of the time and place of sale and of the property to be sold, shall have been given by the Trustee by publication thereof in at least one daily newspaper published in the City of Indianapolis, and in at least one daily newspaper published in the City of New York, once in each week for not less than six consecutive weeks (together with such other notice, if any, as may be required by law), and the Trustee may, without further advertising such sale, adjourn the same from time to time for such period or periods as it may deem advisable, and after such sale shall execute, acknowledge and deliver to the purchaser or purchasers a good and sufficient deed of conveyance of said property, which shall be a perpetual bar, both in law and in equity, against the Traction Company, its successors and assigns, and all persons claiming through or under it, or them, with respect to any of the property sold, and all right, title and interest therein. The Traction Company shall, and will, if and when requested thereafter, make, execute, and deliver such deeds and other instruments as shall be reasonably advised or required to confirm and assure such title and ownership in and to such purchaser or purchasers.

4. Upon any sale purporting to be made in pursuance of the power or trust for sale hereinbefore contained, or in any proceedings to foreclose this security, the purchaser, or purchasers, or any subsequent purchaser, shall not be bound to see or inquire whether
195 any such request or notice as aforesaid has been made or given, or whether this security has become enforceable, or otherwise as to the propriety or regularity of such sale, and payment to the Trustee of the purchase money shall discharge the purchaser

or purchasers therefrom, and from all liability to see to the application thereof; and as affecting the title to any property purchased at such sale, the statement set forth in any affidavit made by an officer of the Trustee and attached to the deed of conveyance relating to any default, or to such sale, shall conclusively be deemed to be true; and upon any such sale the purchasers shall be entitled to be allowed as paid in or towards satisfaction of the purchase money, such sum as shall be payable to them out of the proceeds of such sale in respect of any bonds held by them, and the sum so allowed shall be endorsed thereon as paid.

5. The proceeds arising from any such sale shall be applied by the Trustee as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the Trustee, its agents, attorneys, and counsel, and all expense, liabilities and advances made and incurred by the Trustee hereunder, and all payments made by it, or by any other interested person on account of taxes, assessments, insurance, premiums and other charges in respect of the mortgaged premises, and all other sums payable to the Trustee hereunder.

196 Second. To the payment of the whole amount of principal and interest which shall then be owing or unpaid upon the said bonds, whether the said principal, by the tenor of said bonds, be then due or yet to become due, and in case of the insufficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, without preference of one bond over any of the others, or of interest over principal, or of principal over interest.

Third. To pay over the surplus, if any, on demand, to whomsoever may be lawfully entitled to receive the same.

6. The foregoing powers of entry and sale are each, or both of them, remedies cumulative to all other remedies, suits, actions and proceedings at law or in equity, for the protection and security of the holders of the bonds secured by this mortgage, and in case the security hereby constituted shall become enforceable as hereinbefore provided, the Trustee may, in its discretion, and notwithstanding any such request as aforesaid, pursue any other suit, action, or proceeding to enforce this mortgage or the lien thereof, or to enforce or protect the rights and interest of the holders of the said bonds. In case the Trustee shall so proceed by suit or suits in law or equity, it

shall be entitled to have the mortgaged premises sold by
197 judicial sale under an order or decree of a court of competent jurisdiction, and shall, pending any such suit or proceedings, be entitled to the appointment of a receiver for such works, property, franchises, rights, privileges, immunities, and the fares, freights, tolls, profits and income thereof, and in the event of such judicial sale the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of any sale under and by virtue of the power of sale contained in Section 3 of this Article, and all stipulations and provisions in this

indenture contained with reference to, or consequent upon the sale of such mortgaged premises and property, rights and franchises, when, or if sold under such power of sale shall be applicable and applied as far and as nearly as may be, in the event of such judicial sale being made under the order or decree of such court.

7. No suit or proceedings for the foreclosure of this mortgage shall be instituted or prosecuted by the holder of any bond or bonds or coupon or coupons of the issue secured hereby until after the Trustee shall have been requested in writing to take such action, and it shall have refused or failed to comply with such request within thirty days after the same shall have been made.

8. The Traction Company hereby agrees to waive and does hereby irrevocably waive all benefit and advantage of all exemption, extension, valuation, appraisement, and redemption laws now, 198 or which may hereafter be passed by the United States or any State thereof, and all laws now existing or which may hereafter be passed which may in any way impede or delay the Trustee in any manner, in the execution of the trusts hereby created, or prevent it from performing said trusts, or in any manner delay the sale of the mortgaged property when sale thereof becomes proper for the enforcement of the security hereby created.

Article VII.

1. Upon the payment of the principal moneys secured by the said bonds and the interest thereon, according to the terms thereof, and all sums of money payable to the Trustee or to any bondholder, according to the provisions hereof, the Trustee shall, at the request and cost of the Traction Company, or its successors or assigns, release and discharge this mortgage and the premises comprised in the same, and the Trustee may execute such release and discharge upon production of all the said bonds canceled, or such other evidence of such payment as the Trustee shall think sufficient.

And in case any of the said bonds or coupons shall not be presented for payment when the principal moneys secured by the said bonds, respectively, shall be due and payable, the Traction Company shall be at liberty, if it see fit at any time thereafter, to give to the Trustee for the benefit of the holder or holders thereof, 199 cash or such other security as the Trustee shall think sufficient for the payment of such bonds and coupons, respectively; and from and after the giving of such cash security the mortgaged premises shall be liberated from the trusts herein declared for securing the payment of such bonds and coupons, respectively, and a release and discharge of this mortgage shall be executed by the Trustee in the same manner as if the said bonds and coupons had been paid; and the certificate of the treasurer of the Traction Company, or such other officer thereof as the Trustee shall think proper, that certain bonds and coupons in such certificate specified have not been presented for payment shall be sufficient evidence of that fact to authorize the Trustee to act under the power or trust lastly hereinbefore contained; and no subsequent purchaser, or person subsequently acquiring any interest in the said premises, shall be in any way con-

cerned to ascertain or inquire whether any event has happened upon which the Trustee is herein authorized or directed to execute a release and discharge of this mortgage.

2. Whenever the Traction Company shall have purchased and canceled 90 per cent of the bonds at any time issued hereunder, the Trustee shall, upon the request of the Traction Company, release and discharge this mortgage and the premises comprised 200 in the same, as herein provided in case of payment of the bonds at their maturity and other moneys due hereunder, if the Traction Company shall deposit with the Trustee a sum of money equal to the principal of the remaining bonds outstanding, and the unpaid interest, accrued and to accrue thereon to their maturity, together with all sums of money payable to the Trustee, according to the provisions hereof.

Article VIII.

No holder of any bond hereby secured shall have recourse, either directly or through the Traction Company, for its payment against any stockholder, officer, or director of the Traction Company by reason of any liability whatsoever incurred or imposed upon him by virtue of any law or statute which may now or may hereafter be in force.

Article IX.

1. It is hereby covenanted, stipulated and agreed by and between the parties hereto, and the trusts created by this instrument are accepted by the Trustee hereunder upon these express conditions: That the said Trustee, its successor or successors, shall not be in any way or manner liable or responsible for, or by reason of, permitting or suffering the mortgagor herein to use and enjoy, retain or be 201 in possession of all or any part of the rights and property, franchises, estates and premises hereby granted and conveyed in mortgage, or mentioned, agreed and intended so to be, nor for any loss, injury, determination, deterioration, destruction or damage which may be done, suffered, happen or occur to said rights and property, franchises, estates, and premises by the said mortgagor, its agents, servants or employes, or any other person or persons whomsoever, through fire or any other cause whatsoever, nor from the result or consequence of any breach by said mortgagor, its successors or assigns, of any of the covenants, stipulations, or agreements in this instrument contained, nor for any act or omission of the said mortgagor, its successors, agents, servants, or employes, nor liable to see to the application of the proceeds of any of the bonds secured hereby, nor for any act, default, or misconduct of any agent or agents, or any other person or persons whomsoever employed by said Trustee, unless said Trustee, its successor or successors, shall have been grossly negligent in the selection or continuance in employment of such agents, person, or persons, nor shall said Trustee, its successor or successors, be answerable except for their own wilful default or gross neglect; and if said Trustee, its successor or successors, shall at any time exercise the rights and

authorities, powers and privileges in this instrument upon it conferred, and it enabling to enter into possession of said mortgaged estates, rights, premises and property, and use, manage, operate, and control the same under the trusts herein, it, the said Trustee, its successor or successors, shall be indemnified out of the funds and property which shall so, as aforesaid, come into its hands, from and against all actions, suits, claims and demands of whatsoever nature against it, arising from or by reason of the negligence, carelessness, or misconduct of its officers, agents, servants, or employes. And in all cases said Trustee, its successor or successors, shall receive and be paid out of the trust estate just compensation for all services which it may render, by virtue of the trust created in this instrument, and shall be and is hereby authorized and empowered at the expense of said trust to pay such reasonable compensation as it may deem proper to such attorneys, servants, and agents as it may reasonably employ in the management thereof; and said Trustee may resign from the trusts herein created by first giving notice in writing to the mortgagor herein, its successors or assigns, and to all bondholders whose addresses may be known to said Trustee at least sixty days before such resignation shall take effect (or such shorter notice as may be accepted as sufficient), and upon the execution and delivery of a deed of conveyance and transfer to a successor in the trust, if necessary; such notice, so as aforesaid, to be given to said bondholders, to be to them given by notice sent by mail to their addresses as aforesaid.

203 2. The recitals and statements of fact in this mortgage contained are made by and on behalf of the said Mortgagor, and the said Trustee, its successor or successors, assume no responsibility for the correctness thereof.

3. The right of action under this Indenture is vested exclusively in the Trustee, and under no circumstances shall any bondholder or bondholders (including in this term any coupon holder or coupon holders) have any right to institute an action or other proceeding on or under this Indenture for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage except in case of refusal on the part of the Trustee to perform any duty imposed on it by this agreement, and all actions and proceedings for the purpose of enforcing the provisions of this Indenture shall be instituted and conducted by the Trustee according to its sound discretion; but the Trustee shall be under no obligation to institute any such suit, or to take any proceedings under this Indenture, or to enter any appearance, or in any way defend in any suit in which it may be made defendant, or to do anything whatever as Trustee until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees, and other reasonable disbursements, and from all possible claims for damages for which it may become liable or responsible on proceeding to carry out such request or demand. The Trustee may, nevertheless, begin suit, or appear in and defend suit, or do anything else in its judgment proper to be done by it as such Trustee without

indemnity, and in such case it shall be indemnified therefor from the trust fund.

4. The Trustee shall be under no obligation to recognize any person as holder or owner of any bonds or coupons secured hereby, or to do, or refrain from doing any act pursuant to the request or demand of any person, until such supposed holder or owner shall produce the said bonds or coupons and deposit the same with the Trustee.

5. It shall be no part of the duty of the Trustee to file or record this Indenture as a mortgage or conveyance of real estate, or as a chattle mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to see that such insurance is taken out or renewed, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the Trustee may,
205 in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done, but the Traction Company, for itself and assigns, covenants and agrees to do all said matters and things.

6. The Trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employé selected with reasonable discretion. It shall be entitled to be reimbursed all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same, and all such fees, commissions, compensation, and disbursements shall constitute a lien on the mortgaged property and premises.

7. In case at any time it shall be necessary and proper for the Trustee to make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing any thing as such Trustee, the certificate of the Traction Company, under its corporate seal, attested by the signature of its President and the affidavit of one or more Directors, shall be conclusive evidence of such fact to protect the Trustee in any action that it may take by reason of the supposed existence of such fact.

8. All recitals, statements of fact and representations herein contained are made on behalf of the Traction Company, and the Trustee
206 assumes no responsibility as to the correctness of the same, nor is the Trustee to be understood as making any representations as to the character, extent, or value of the above described property or as to the title thereto.

9. The Trustee shall be protected in acting upon any notice, request, consent, certificate, or other paper or document believed by it to be genuine and to be signed by a proper officer of the Traction

Company, or by the proper person to sign such paper in any particular case.

10. It is hereby further covenanted and agreed between the parties hereto, that the Trustee is in no event to be held responsible should a court of competent jurisdiction determine that the bonds issued under the protection of this mortgage are ultra vires.

Article X.

Until the permanent bonds to be issued under and secured by this indenture can be engraved, lithographed, or finally prepared and executed, the Traction Company may execute, and upon its request the Trustee shall certify and deliver in lieu of such permanent bonds, and subject to the same provisions and limitations, its temporary negotiable or registered bonds of any denomination, without coupons, and substantially of the tenor of the permanent bonds to be issued hereunder, or temporary receipts entitling the holders thereof to such bonds when ready for delivery, and upon surrender of such temporary bonds or receipts for exchange, the Traction Company shall issue, and upon cancellation of such surrendered bonds or receipts, the Trustee shall certify and deliver in exchange therefor, permanent engraved, lithographed, or otherwise prepared coupon bonds substantially in the form hereinbefore set out for the amount of such temporary bonds or receipts surrendered, and until so exchanged such temporary bonds or receipts bearing the certificate of the Trustee shall be entitled to the same security as the permanent bonds to be issued hereunder.

Article XI.

If any bond issued hereunder shall be mutilated or destroyed, the Traction Company may, upon terms and conditions prescribed by its Board of Directors, issue and deliver in lieu thereof a new bond of like tenor, amount and date, which bond when so issued shall be certified by the Trustee upon due proof of such mutilation, loss, or destruction, and upon receiving indemnity satisfactory to the Trustee.

In witness whereof the Traction Company has caused these presents to be executed by its President, and its corporate seal to be hereunto affixed, duly attested by its Secretary, and the Trustee to signify its acceptance of the trusts hereby created, has caused these presents to be executed by its President and its corporate seal to be hereunto affixed, duly attested by its Secretary, as of the day and year first above written.

INDIANAPOLIS, CRAWFORDSVILLE AND
WESTERN TRACTION COMPANY.

[SEAL.] By F. A. RAMSEY, *President*.

Attest:

EDWARD HAWKINS, *Secretary*.

THE MARION TRUST COMPANY.

[SEAL.] By HUGH DOUGHERTY, *President*.

Attest:

FRED K. SHEPARD, *Secretary*.

STATE OF INDIANA,
Marion County, ss:

Before the undersigned, a notary public in and for said county and state, this 21st day of May, 1906, personally came the Indianapolis, Crawfordsville and Western Traction Company, by A. F. Ramsey, its President, and Edward Hawkins, its Secretary, and acknowledged the execution of the foregoing mortgage.

209 Witness my hand and notarial seal.

[SEAL.]

JOSEPH H. C. DENMAN,
Notary Public.

My commission expires 4th October, 1909.

STATE OF INDIANA,
Marion County, ss:

Before the undersigned, a notary public in and for said county and state, this 21st day of May, 1906, personally came The Marion Trust Company, by Hugh Dougherty, its President, and F. K. Shepard, its Secretary, and acknowledged the execution of the foregoing mortgage.

Witness my hand and notarial seal.

[SEAL.]

JOSEPH H. C. DENMAN,
Notary Public.

My commission expires 4th October, 1909.

Received for Record The 25th day of May A. D., 1906 at 9½ o'clock A. M. and recorded in Record 476, page —.

[SEAL.]

S. L. SHANK,
Recorder Marion County.

Fee \$11.50 Paid.

Filed for Record, May 25, 1906, at 1 o'clock P. M., and recorded in Mtg. Record No. 48, page —, of the Records of Hendricks County.

ELLIS M. WEAVER,
Recorder Hendricks Co.

\$11.50 Paid.

210 Received for Record This 25th day of May, A. D., 1906, at 11:25 o'clock P. M., and recorded in Record 22, Page —.
[SEAL.] ALBERT K. MAHON,
Recorder of Vermillion County.

Fee \$11.50 paid 5-25-'06.

Received for Record The 26 day of May, A. D., 1906, at 8 o'clock, A. M., and recorded in Record 27, pages 194.

[SEAL.] JOHN H. WILSON,
Recorder of Warren County.

Recorder's fee \$11.50.

Received for Record This 25 day of May, 1906, 4 o'clock P. M. and recorded in Record 59, page —.

[SEAL.] A. W. L. NEWCOMER,
Recorder Boone County.

\$11.50 paid.

Received for Record The 25 day of May, 1906, at 7:30 o'clock P. M., and recorded in Record 21, page —.

[SEAL.] GUY F. SPINNING,
Recorder Fountain County.

Recorder's fee \$11.50 paid.

Received for Record 26th day
of May, A. D. 1906, and recorded
in Record 174, page —.

[SEAL.] JNO. F. WARBRITTON

R. M. Co.

Fees \$11.50 Pd.

211 STATE OF INDIANA,
Montgomery County, ss:

I, the undersigned, Recorder in and for said County, do hereby certify that the above and foregoing mortgage between the Indianapolis, Crawfordsville & Western Traction Company and the Marion Trust Company, of Indianapolis, Indiana, is now of record in the Recorder's Office of said Montgomery County, State of Indiana, and of which records I am the legal custodian. Said mortgage is recorded in Mortgage No. 74, at page 479 thereof, and is indexed in General Index of Mortgages for said Montgomery County for books 71 to 74, and shows said mortgage to have been recorded on the 26th day of May, 1906, at 1:30 P. M. by John F. Warbritton, R. M. Co.

Witness my hand and official seal.

Dated this 26th day of January, 1911.

[SEAL.]

HENRY D. SEIVERS,

R. M. Co.

STATE OF INDIANA,
Boone County, ss:

I, the undersigned, Recorder in and for said County, do hereby certify that the above and foregoing mortgage between the Indianapolis, Crawfordsville & Western Traction Company and the Marion Trust Company, of Indianapolis, Indiana, is now of record in the Recorder's Office of said Boone County, State of Indiana, and of which records I am the legal custodian. Said mortgage is

212 recorded in Mortgage Record No. 59 at page 421 thereof, and is indexed in General Index of Mortgage for said Boone County Book No. 11, and shows said mortgage to have been recorded on the 25th day of May, 1906, at 3 o'clock P. M. By A. W. L. Newcomer, R. B. C.

Witness my hand and official seal.

Dated January 26, 1911.

[SEAL.]

WILLARD HOOTEN,

R. B. C.

STATE OF INDIANA,
Marion County, ss:

I, the undersigned, Recorder in and for said County, do hereby certify that the above and foregoing mortgage between the Indianapolis, Crawfordsville & Western Traction Company and the Marion Trust Company, of Indianapolis, Indiana, is now of record in the Recorder's Office of said Marion County, State of Indiana, and of which records I am the legal custodian. Said mortgage is recorded

in Mortgage Record No. 476 at page 551 thereof, and is indexed in General Index 81 & Chattel #28 for said Marion County, and shows said mortgage to have been recorded on the 25th day of May, 1906, at 9:30 A. M. By S. L. Shank.

Witness my hand and official seal.

Dated January 26th, 1911.

[SEAL.]

JOSEPH P. TURK,
R. M. C.

[SEAL.]

213-238 STATE OF INDIANA,
Hendricks County, ss:

I, the undersigned, Recorder in and for said County, do hereby certify that the above and foregoing mortgage between the Indianapolis, Crawfordsville & Western Traction Company and the Marion Trust Company, of Indianapolis, Indiana, is now of record in the Recorder's Office of said Hendricks County, State of Indiana, and of which records I am the legal custodian. Said mortgage is recorded in Mortgage Record No. 48 at page 354 thereof, and is indexed in General Index of Mortgages for said Hendricks County in Book No. 5, and shows said mortgage to have been recorded on the 25th day of May, 1906, at 1 P. M. by Ellis M. Weaver.

Witness my hand and official seal.

Dated this 26th day of January, 1911.

[SEAL.]

JOHN S. DUCKWORTH,
Recorder Hendricks County, Indiana.

* * * * *

239 *Answer of the Marion Trust Company, Trustee, to the Cross-Bill of Complaint of the Moore-Mansfield Construction Company.*

To the Honorable Judges of said Court:

The defendant, The Marion Trust Company, Trustee, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said cross-bill of complaint of the said cross-complainant, The Moore-Mansfield Construction Company, contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

I.

This defendant admits upon information and belief that said cross-complainant is a corporation organized and existing under and by virtue of the laws of the State of Indiana, and that the defendant the Indianapolis, Crawfordsville & Western Traction Company is also a corporation organized and existing under the laws of said State of Indiana.

That the Electrical Installation Company, complainant in said cause, is a corporation organized and existing under and by virtue of the laws of the State of Illinois; and that the Allis-Chalmers Company, defendant herein, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

239½ Said defendant further admits that said The Marion Trust Company is a corporation organized and existing under the laws of the State of Indiana.

II.

This defendant further admits upon information and belief so much of said cross-complainant's cross-bill of complaint as alleges that on the 21st day of February, 1906, the defendant Traction Company, being the owner of certain franchises, rights-of-way and real estate situated and located in the counties of Marion, Hendricks, Boone and Montgomery, in the State of Indiana, and being desirous of constructing thereon a certain interurban traction line extending from the City of Indianapolis to the City of Crawfordsville through a portion of said counties of Marion, Hendricks, Boone and Montgomery, entered into a certain contract in writing with said cross-complainant for the construction of its said railroad; but this cross-complainant has no absolute knowledge, and is not sufficiently advised as to the terms of said agreement to state whether Exhibit "A" filed with said cross-complaint is a copy thereof or not; nor what the exact terms and conditions of said contract were, and said defendant, therefore, neither admits nor denies the averments of said paragraph two of said cross-complaint, purporting to set forth the terms of said contract, but asks that said cross-complainant be required to make such proof thereof as it is able to make.

III.

This defendant is not sufficiently advised to enable it to state with certainty whether or not on the 6th day of June, 1906, said
240 defendant Traction Company with the knowledge and assent of said cross-complainant entered into a contract with the Electrical Installation Company, plaintiff in this cause, whereby said Installation Company agreed to do all the work and furnish all the materials for the construction and equipment of the pole line over-head electrical circuit, power house and substation buildings and machinery, repair shop and rolling stock for a single track and turn-outs electric railway to be built from Indianapolis to Crawfordsville for said Traction Company; nor whether or not said cross-complainant thereby relieved from the performance of any of the work so undertaken to be performed by said Installation Company; nor whether or not to that extent said contract marked Exhibit "A," and filed with said cross-complaint was modified, and said cross-complainant relieved from the performance of any of the work so contracted and agreed to be performed by the said Installation Company; nor whether or not thereafter and thenceforth all of the work

to be performed by said Installation Company was separate and distinct from the work to be performed by said cross-complainant, nor whether or not said cross-complainant was any longer under obligations to perform any of the work or furnish any of the materials so undertaken and agreed to be furnished and performed by said Installation Company. All as alleged in paragraph three of said cross-bill of complaint; and being insufficiently and inadequately advised as to the terms of said arrangement so referred to in said paragraph three of said cross-bill, and as to the respective rights and obligations of the parties thereto, arising thereunder, 241 this defendant neither admits nor denies the averments of said paragraph three of said cross-bill of complaint, but asks that said cross-complainant be required to make strict proof thereof.

IV.

This defendant admits upon information and belief as alleged in paragraph four of said cross-complaint, that said cross-complaint entered upon the construction of said work, but said defendant is not sufficiently advised, and has no such definite and certain knowledge as enables it to state whether or not said work was fully completed, nor what the aggregate cost thereof was, nor whether the bill of particulars filed with said cross-complaint, and designated as Exhibit "B" is a correct statement or not.

This defendant admits upon information and belief that said Traction Company paid upon said contract the sum of \$499,714.59, but whether or not any further or additional payments were made upon said contract, nor whether any balance remains unpaid on said contract price, and if so what the true amount of such balance is, this defendant is not advised with such certainty as to enable it to state, and, therefore, neither admits nor denies the averments of said paragraph four of said cross-complaint in that behalf.

This defendant has no definite knowledge whether said defendant Traction Company accepted said work as performed and completed by said cross-complainant, nor whether or not there has accrued in favor of said cross-complainant and against said Traction Company a cause of action for \$28,013.75, or not; nor what sums or 242 items said amount claimed by said cross-complainant includes.

As to all matters of fact alleged in said paragraph four of said cross-complaint not herein expressly admitted to be true this defendant asks that said cross-complainant be required to make strict proof thereof.

V.

This defendant has no sufficient knowledge nor adequate information to enable it to state whether or not said cross-complainant fully complied with said agreement for the construction of said railroad; nor whether or not subsequent to the execution of said agreement said Traction Company, with or without the consent of said cross-complainant, entered into an agreement with said complainant,

Installation Company, for the construction by said last named company of a certain portion of said work; nor whether or not if any portion of said work was so sublet, said complainant, Installation Company, completed the same, as agreed; nor whether said cross-complainant upon the completion of said work, if the same was completed, furnished the engineer of said Traction Company evidence satisfactory, to-wit: that the work covered by said contract was free and clear from all liens for all labor or material, and that no claim then existed against said property for which any lien might or could be enforced arising through or under the contract between said Traction Company and said cross-complainant, save and except the lien claimed by said cross-complainant to exist in its favor; nor whether or not before filing suit, as alleged in said cross-complaint

243 against said Traction Company, said cross-complainant executed under its hand and seal to said Traction Company the release and discharge described in paragraph five of said cross-complaint, or any release or discharge, nor whether it offered to surrender and deliver the same to said defendant Traction Company upon the conditions mentioned in said paragraph five of said cross-complaint, or any other conditions; nor whether or not said Traction Company refused to accept the same unless delivered unconditionally; nor whether or not said Traction Company neglected or refused to pay the alleged balance claimed to be due said cross-complainant; nor whether said cross-complainant has, since been willing or able, or is now willing or able to deliver such release and discharge as alleged in said paragraph five.

As to said matters of fact alleged in said paragraph five of said cross-complaint this defendant neither admitting nor denying the same, asks that said complainant be required to make strict proof thereof.

VI.

This defendant has no actual knowledge, nor such certain or definite information as to enable it to state whether or not on the 7th day of September, 1907, or at any other time said cross-complainant desiring to acquire, maintain and enforce a mechanic's lien upon the property of said defendant Traction Company described in paragraph six of said cross-complaint, filed, or caused to be filed, a notice of its intention to hold a mechanic's lien upon said property in the counties through which said line of railroad runs, as alleged

244 in said cross-complaint; nor if so filed whether Exhibit "C" filed with said cross-complaint is a correct copy thereof, nor whether said notices were duly recorded, as required by law, in the several counties mentioned in said paragraph six.

And this defendant therefore neither admitting nor denying the averments of fact contained in said paragraph six of said cross-bill asks that cross-complainant be required to make strict proof thereof.

VII.

This defendant has no knowledge, or information sufficient to enable it to state what the true value of the work and material per-

formed and furnished by said cross-complainant under said contract was, and, therefore, neither admitting nor denying the allegations thereof this defendant asks that said cross-complainant be required to make strict proof of all averments contained in paragraph seven of its cross-bill of complaint.

VIII.

This defendant denies that a reasonable attorney's fee for the enforcement of said mechanic's lien, if any exists, is \$5,000, and being insufficiently advised as to the true value of such service this defendant asks that if it shall become material or proper in this cause to ascertain the value of said service complainant be required to make proof thereof.

IX.

This defendant admits upon information and belief that on or about the 25th day of August, 1908, said cross-complainant filed in the Superior Court of Marion County, Indiana, a certain complaint against said defendant Traction Company, and others, including this defendant as Trustee, and that said action is still pending in said Court; that in said action said cross-complainant sought to enforce an alleged mechanic's lien against the property of said Traction Company for work and labor alleged to have been done, and materials alleged to have been furnished in the construction of said railroad; but as to all matters of fact alleged in said paragraph nine of said cross-complaint this defendant is not sufficiently advised to enable it to state with certainty whether such averments are true or not, and it, therefore, asks that said cross-complainant be required to make strict proof thereof.

X.

This defendant admits upon information and belief that at the time said complaint was filed in said Superior Court of Marion County, Indiana, said cross-complainant, said Traction Company and this defendant were all citizens of the State of Indiana, as alleged in paragraph ten of said cross-bill; but this defendant is not sufficiently advised to enable it to state with certainty whether or not there was any right in said cross-complainant, at said time, to apply to this Honorable Court for relief in its said alleged cause of action against said Traction Company, nor whether any Federal question then or thereafter existed between said cross-complainant and said defendants prior to the appointment of said Receiver; nor whether the defendant Guthrie had theretofore obtained judgment against said Traction Company, or had any lien or claim other than an open and unsecured claim against the same; nor whether if said Guthrie afterward acquired a lien the same was paramount or
246 subordinate to that of said cross-complainant, if any it has, and as to all matters of fact alleged in paragraph ten of said cross-complaint not herein expressly admitted to be true said defendant neither admitting nor denying the same, asks that said cross-complainant be required to make strict proof thereof.

XI.

This defendant denies that at and prior to the time of the execution of said contract between said cross-complainant and said Traction Company, or at any other time, it was and had been the settled law of the State of Indiana, that any contractor or sub-contractor performing, or causing to be performed, work or furnishing, or causing to be furnished materials upon any building or structure in the State of Indiana, could, by complying with the mechanic's lien law of the State then existing, maintain and enforce a mechanic's lien for the work and materials so furnished and performed.

This defendant further denies that from and after the 10th day of March, 1873, or at any other time prior to the alleged completion of its contract by said cross-complainant, any person whether contractor, sub-contractor, laborer, material or supply man, was accorded by the Statutes of the State of Indiana, any right to a mechanic's lien upon railroad property to and for which it had furnished, and caused to be furnished, materials, and on which it had performed, or caused to be performed, labor.

This defendant further denies that it had become and was the settled policy and law of the State of Indiana, as construed by all of its courts, whether those of last resort or nisi prius courts,

247 that said right to take and enforce a mechanic's lien for materials furnished and work and labor performed existed in favor of contractors and sub-contractors, as well as laborers, material and supply men, or that said cross-complainant had any such knowledge or relied upon any such alleged rights; but this defendant has no knowledge as to what the belief of said cross-complainant was as to its said rights in the premises, nor what influence such belief had, if any, upon the action of said cross-complainant in entering into said contract.

This defendant denies that any of the laws of the State of Indiana referred to by title in paragraph eleven of said cross-bill gave to said cross-complainant, or others in like situation, the right to hold a mechanic's lien for work and labor done and performed, or materials so furnished, and denies that any of the decisions and opinions of the Supreme Court of said State, referred to in said paragraph eleven by their respective titles, had so adjudged.

This defendant further denies that by reason of said respective statutes of said State, or any of them, nor by reason of said decisions of the courts of said State, or any of them, nor in any other manner, did said cross-complainant acquire any contract right to have, maintain and enforce a mechanic's lien on the line of railroad of said defendant Traction Company under the contract sued on, and denies that the State of Indiana, by the decision of its Supreme Court in the case of *The Indianapolis Northern Traction Company v. Brennan*, referred to in said paragraph eleven, nor by any other decision or in any other manner has undertaken to impair any obligation of the contract sued on, or other contract right of said cross-

248 complainant, or that it is the duty of the courts of said State of Indiana to maintain and enforce any alleged right in said cross-complainant to prosecute or enforce its alleged mechanic's lien

upon said railroad property, and denies that the Act of March 1883 of the General Assembly of said State as construed by said Supreme Court, is in violation of any provision of the Constitution of the United States.

This defendant further denies that said cross-complainant has any right now in this action, or otherwise, to enforce said alleged mechanic's lien against the property of said Traction Company described in said cross-bill.

This defendant has no knowledge as to how far, if at all, said Superior Court of Marion County may feel constrained to follow the opinion of the Supreme Court of said State, as announced in said Indianapolis Northern Traction Company v. Brennan case; but said defendant denies that any Federal question has arisen out of said decision.

As to all matters of fact alleged in said paragraph eleven of said cross-complaint not herein admitted to be true or otherwise traversed, confessed or denied, this defendant alleges that it has no adequate information to enable it to state whether such alleged facts are true, or not, and as to each and all of them it asks that said cross-complainant shall be required to make strict proof thereof.

XII.

This defendant admits that the original bill in this cause was filed on the 26th day of June, 1909; that said cross-complainant was not made a party defendant to said original bill until, to-wit, 249 the — day of July, 1909, when by leave of court said cross-complainant and others described in paragraph twelve of said cross-complainant's said cross-bill, were made additional defendants to said original bill; that on the 9th day of July, 1909, by an order duly and properly entered in said cause, one Harry J. Milligan was duly appointed Receiver of the property and assets of said Traction Company, and duly qualified and entered upon the discharge of his duties as such Receiver, and said property is now and has ever since remained in the custody and control of this Honorable Court.

As to all matters of fact alleged in paragraph twelve of said cross-bill not herein expressly and specifically admitted or denied this defendant avers that it has no certain and adequate information as enables it to state whether such matters of fact are true or not, and, therefore it neither admits nor denies the same, and this defendant asks that strict proof may be required as to all matters alleged in said paragraph twelve not herein expressly admitted to be true.

XIII.

This defendant further answering said cross-bill of complaint avers that heretofore, to-wit, on the 21 day of May, 1906, said defendant Indianapolis, Crawfordsville & Western Traction Company, being first duly authorized and empowered in that behalf by its proper officers, duly executed and delivered to this defendant as Trustee, and to its successor or successors in trust, and to its assigns; a certain mortgage or deed of trust:

"upon and to all and singular the lines of railroad constructed and belonging to and in process of construction by the Traction Company, extending from and in the City of Indianapolis 250 by way of the towns of Clermont, Brownsburg, Pittsboro, Raintown, Lizton, Jamestown, New Ross and Mace to and in the City of Crawfordsville, and through and from said City by way of the towns of Wesley, Waynetown, Hillsboro and Veedersburg to, in and through the City of Covington, and in and through the counties of Marion, Hendricks, Boone, Montgomery, Fountain, Warren and Vermillion, in the State of Indiana, to the western boundary of the State of Indiana at a point east of the City of Danville, in the State of Illinois, and all branches and extensions thereof, together with all lines of railroad and branches and extensions which may hereafter be constructed or otherwise acquired by said Traction Company; and also all and singular the lands, rights of way, and real and leasehold estate, already, or hereafter to be, acquired by the Traction Company, and used or intended to be used for the said lines of railroad or otherwise; and also all and singular, the engines cars, rolling stock, dynamos, equipment, machinery, tools, implements, materials, furniture, fuel, supplies, contracts, books, documents, choses in action, and other chattels, and personal estate belonging to, or hereafter to be acquired by, the Traction Company; and also all and singular the franchises, rights, and privileges that the Traction Company now has, or may hereafter acquire, for, or in respect of the said railroad, or any branch or extension thereof, or the construction, maintenance, improvement, working, or use of the same, or otherwise, together with all stations, warehouses, power houses, machines shops, bridges, structures, approaches, works, privileges, easements, and appurtenances to, or with, the said premises or any part thereof, now, or at any time during the continuance of this security, appertaining or enjoyed, and all other property, real and personal, rights, privileges, franchises, and easements of every kind and nature, whether now owned or hereafter acquired by the Traction Company, together with all rents, tolls, earnings, profits, revenues, or income, arising or to arise from the property or any part thereof hereby mortgaged, and whether the same be now owned or hereafter acquired. To have and to hold the said premises hereinbefore expressed to be hereby granted unto and to the use of the Trustee and its successors and assigns forever, upon and for the trusts and purposes hereinafter expressed of and concerning the same,"

to secure the payment of certain bonds executed and to be executed and issued under the terms and conditions of said mortgage or deed of trust by said defendant Traction Company, or such thereof as may be outstanding, but not exceeding \$3,000,000 par value.

251 A copy of said mortgage or deed of trust is herewith filed, made part hereof and marked Exhibit "A".

They being thereunto properly authorized the officers of said defendant Traction Company did, in accordance with the provisions and conditions of said mortgage cause to be executed, issued, sold and delivered 1500 first mortgage gold bonds, each of the denomina-

tion of \$1,000, dated March 1, 1906, payable to bearer, or if registered to the registered holder thereof on the 1st day of July 1936 in gold coin of the United States of the then present standard weight and fineness, at the office of Van Norden Trust Company in the City of New York, with interest at the rate of five per cent, per annum payable in like gold coin on the first days of January and July in each year to the bearer of the respective coupons for such interest thereto annexed, all in accordance with the terms, provisions and conditions specifically set forth in said respective bonds, which were of like tenor. A copy of which, together with a copy or form of coupon thereto attached, is filed herewith, made part hereof and marked Exhibit "B".

XIV.

This defendant further answering said cross-bill of complaint avers that on the 25th day of May 1906, within ten days after the execution thereof, this defendant caused said deed of trust or mortgage to be duly recorded in the offices of the respective recorders of Marion, Hendricks, Boone, Fountain, Warren, Vermillion and Montgomery counties, Indiana, and that the same was so recorded and indexed in the proper records of each of said counties
252 in the respective records, and at the respective pages stated in the respective certificates of said several county recorders attached to and endorsed upon said mortgage or deed of trust, as shown in the copy thereof herewith filed, and marked Exhibit "A".

This defendant further avers that each and everything necessary to be done, in order to give full effect to said mortgage or deed of trust, and to the bonds secured thereby, has been fully done and performed, and that said mortgage or deed of trust is, by its terms, made, and is in fact, a first lien upon all the property of said defendant Traction Company, as above described.

XV.

That among the provisions of said mortgage or deed of trust is one to the effect that:

"Whenever any default shall be made by the Traction Company in the payment of any interest moneys secured hereby, and such default shall continue for six months, the Trustee shall, upon request of the holders of a majority of the bonds then outstanding, declare the whole principal sum secured by the said bonds to be due and payable, anything to the contrary herein contained notwithstanding."

That another provision of said mortgage or deed of trust empowers this defendant as Trustee, whenever said mortgage shall be matured, as aforesaid, or otherwise, to institute proceedings in law or in equity for the protection and security of the holders of the bonds secured by said mortgage, and in the event said

"Trustee shall so proceed by suit or suits in law or equity, it shall be entitled to have the mortgaged premises sold by judicial
253 sale under an order or decree of a court of competent jurisdiction, and shall, pending any such suit or proceedings, be

entitled to the appointment of a receiver for such works, property, franchises, rights, privileges, immunities, and the fares, freights, tolls, profits and income thereof, and in the event of such judicial sale the net proceeds thereof, etc."

That default was in fact made in the payment when due of the interest coupons on the 1st day of July, 1909, and said default has ever since continued; and that more than six months after such default, to-wit, on the 15th day of January, 1910, the holders of a majority of the bonds then outstanding, to-wit: \$1,500,000, par value, requested this defendant, as Trustee, to declare, and pursuant to said request it has declared, and hereby declares the whole principal sum of said bonds secured by said mortgage to be due and payable.

XVI.

This defendant further alleges that the assets of said defendant Traction Company in the hands of said Receiver including the corpus of said property, and the income thereof, are insufficient to pay said outstanding bonds; that said defendant Traction Company is insolvent, and has been so adjudged by this Court; that there are no funds, or resources of any kind or description from which any sum due said cross-complainant can be paid without impairing the security of said bondholders; and this defendant as Trustee therefore says that the rights of said cross-complainant, whatever rights it may have, if any, are junior and inferior to the lien of this
254 defendant as Trustee under said mortgage or deed of trust to all the property described therein, including the income and earnings thereof.

And this defendant, therefore, humbly prays that said cross-bill of complaint shall be dismissed, or that in any decree which shall or may be entered in this cause the rights of this defendant, as Trustee, and the bondholders secured by its said mortgage shall be fully protected and preserved; that if the assets of said defendant shall be marshalled and sold, as prayed, and the proceeds thereof distributed, that the Court will order the bonds secured by said mortgage to this defendant, as Trustee, to be paid out of the funds derived from such sale before any part thereof is applied to the payment of said cross-complainant's alleged claim; without this there is any other matter, cause or thing in said cross-complainant's said cross-bill of complaint contained, material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

And will the Court grant unto this defendant such other and further relief in the premises as may seem in accordance with equity.

MILLER, SHIRLEY & MILLER,

*Solicitors for said Defendant,
The Marion Trust Company, Trustee.*

255 This indenture, made this Twenty-first day of May, in the year nineteen hundred and six, between the Indianapolis, Crawfordsville and Western Traction Company, incorporated under the laws of Indiana, (hereinafter called the Traction Company), of the one part, and The Marion Trust Company, of Indianapolis, Indiana, incorporated under the laws of the State of Indiana, (hereinafter called the Trustee), of the other part, witnesseth:

Whereas. The Traction Company was duly incorporated under the laws of Indiana for the purpose of construction, owning and maintaining a system of railroads, switches and side tracks in, through and between certain cities and towns within the said State of Indiana specified in its Articles of Association, and has duly resolved by vote of its directors and stockholders to borrow money in such amounts as shall be necessary to acquire, construct, complete and equip its railroad and discharge obligations incurred therefor, and to issue and dispose of its bonds for the amounts so borrowed to the total aggregate principal amount of not exceeding three million dollars (\$3,000,000) under and subject to the terms and conditions hereinafter specified, and to mortgage its property and franchises to secure the said bonds; and

Whereas, The said bonds are to be of the par value of one-thousand dollars (\$1,000) each, and are to be numbered from one (1) to three thousand (3,000), both inclusive, and with the interest coupons attached thereto, (which shall be signed by
256 the engraved fac-simile signature of the treasurer of said Traction Company) and the certificate of the Trustee thereon are to be substantially in the following form, to-wit:

Indianapolis, Crawfordsville and Western Traction Company.

First Mortgage 5 per cent. Gold Bond.

No. —.

\$1,000.

Be it known that the Indianapolis, Crawfordsville and Western Traction Company, incorporated under the laws of Indiana, for value received, promises to pay to the bearer hereof, or if this bond shall be registered, then to the holder hereof registered according to the provisions hereinafter contained, without relief from valuation or appraisement laws, the sum of one thousand dollars in gold coin of the United States of the present standard of weight and fineness, at the office of the Van Norden Trust Company, in the City of New York, on the first day of July, 1936, and also to pay interest thereon in like coin at the rate of five per cent. per annum on the first days of January and July in each year to the bearer of the respective coupons for such interest hereto annexed, upon presentation thereof at the time and place therein mentioned; each of which coupons is for six months' interest on this bond, except the first, which is for the interest from the date of this bond to July 1, 1906. But if
257 the promisor shall make any default for six months in the payment of any interest hereon, or on any bond of this issue, the principal sum hereby secured shall become due and pay-

able at any time thereafter while the interest remains in default, at the election of a majority in interest of holders of the bonds secured by the indenture hereinafter mentioned at the time outstanding.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the promisor may be required to pay or retain therefrom under any present or future law of the United States or of the State of Indiana, or any county or municipality thereof.

This bond is one of a series of three thousand similar bonds, amounting in the aggregate to three million dollars, all of which are equally secured by an indenture of first mortgage, whereby all the property, real and personal, easements, rights, franchises and privileges, present and future, of the Indianapolis, Crawfordsville and Western Traction Company are mortgaged to The Marion Trust Company, of Indianapolis, Indiana, as trustee for the bondholders.

No recourse shall be had for the payment of the principal or interest of this bond against any stockholder, officer or director of the promisor, either directly or through the promisor, by virtue of any statute, or by enforcement of any assessment, or otherwise, and any and all personal liability of the officers, directors and stockholders of the promisor in respect of said bonds is hereby expressly
258 waived and released by every holder hereof.

This bond, until registered, shall pass by delivery. This bond may be registered in books to be kept for that purpose at the office of the Trustee in the City of Indianapolis, and if so registered, will thereafter be transferable only upon the said books at the office of the Trustee by the owner in person, or by attorney, unless the last preceding registration shall have been to bearer, and the transfer by delivery thereby restored, and it shall continue to be susceptible of successive registrations and transfers at the option of the holder, but such registration shall not affect the negotiability of the annexed coupons.

This bond is valid only when The Marion Trust Company, of Indianapolis, Indiana, has endorsed hereon a certificate that it is one of the bonds in the said indenture specified.

Witness the corporate seal of the Indianapolis, Crawfordsville and Western Traction Company and the signature of its President and Secretary on its behalf the first day of March, in the year 1906.

INDIANAPOLIS, CRAWFORDSVILLE AND
WESTERN TRACTION COMPANY,

[SEAL.] By A. F. RAMSEY, *President*.

EDWARD HAWKINS, *Secretary*.

259

(Form of Coupon.)

\$25.00.

On the first day of January (July), 190-, the Indianapolis, Crawfordsville and Western Traction Company will pay the bearer twenty-five dollars in gold coin of the United States of the present standard of weight and fineness, at the office of the Van Norden Trust Com-

pany, in the City of New York, for six months' interest on its First Mortgage Bond No. —.

OLIVER P. ENSLEY, *Treasurer*.

The Marion Trust Company, of Indianapolis, Indiana, hereby certifies that this bond is one of the series described in the within mentioned mortgage in the aggregate of three million dollars.

[SEAL.] THE MARION TRUST COMPANY,
By HUGH DOUGHERTY, *President*.

260 And afterwards, to-wit: at the November Term of said Court, on the 2nd day of February 1910, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the *the* Marion Trust Company, Trustee, by Messrs. Miller, Shirley and Miller its Solicitors, and by leave of Court files an amendment to its answer to the cross-bill of the Moore-Mansfield Construction Company herein, in the words following, to-wit:

Comes now The Marion Trust Company, Trustee, one of the cross-defendants herein, and, leave of Court having been first obtained, files this its amendment to its answer heretofore filed in this cause to the cross-complaint of Moore-Mansfield Construction Co., to-wit: on the 29th day of January, 1910, said amendment to be inserted at Line 15, Page 7, of said answer and to be in the words and figures following, to-wit:

Via.

This defendant further alleges that said alleged contract of the sixth day of June, 1906, entered into between said Indianapolis, Crawfordsville & Western Traction Company, said Electrical Installation Company, and said The Moore-Mansfield Construction Company contained therein, among others, the following provision, to-wit:

"III.

The Railway Company agrees not to hinder the contractor from prosecuting the work uninterruptedly from start to finish, and agrees that that portion of the construction work which is to be done by the Moore-Mansfield Construction Company shall be completed free from any claim of indebtedness, the holders of which may
261 under the laws of the State of Indiana or of the United States be entitled to a lien of any kind against any of the property of said Railway Company, so that the Railway Company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said Railway Company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana."

And said alleged contract of June 6th, 1906, contained the further, following provision, to-wit:

"XIII.

The Moore-Mansfield Construction Company hereby approves all and singular the terms, agreements, provisions and conditions of this

contract, and the specifications in connection therewith, and agrees that it will do all acts necessary to the carrying out of this agreement so far as the same relates to Moore-Mansfield Construction Company, and it is agreed that the covenants of this agreement shall extend to and bind the successors, assigns, and representatives of the Railway Company and Contractor."

This defendant further alleges that by reason of said provisions in said alleged contract of June 6th, 1906, it matters not whether said Moore-Mansfield Construction Company has filed a notice of its intention to claim a lien as alleged in its said cross bill of complaint or not because by said provisions of said contract said Moore-Mansfield Construction Company has waived and foregone whatever right or rights it may have had at the time of the execution of said contract or which it may have thereafter acquired to claim a lien against property under the laws of the State of Indiana or of the United States.

And this defendant further alleges that under and by the terms of said agreement the said Moore-Mansfield Construction Company admitted and agreed that the only indebtedness of said Indianapolis, Crawfordsville & Western Railway Company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana, should be the first mortgage bonds of said Indianapolis, Crawfordsville & Western Railway Company; that said first mortgage bonds referred to in said agreement are the same bonds which are secured by and issued under the mortgage or deed of trust executed by said Indianapolis, Crawfordsville & Western Railway Company to this defendant, The Marion Trust Company, Trustee, under date of the 21st day of May, 1906, and therefore this defendant further alleges and charges that by the agreements and conditions in said contract set forth and contained the said Moore-Mansfield Construction Company has estopped and forever foreclosed itself from claiming any rights whatsoever which might be or become a lien on said property prior to the lien of said mortgage or deed of trust.

MILLER, SHIRLEY & MILLER,
Solicitors for Defendant Marion Trust Co., Trustee.

263 And at the same time comes the Electrical Installation Company by Messrs. Fyffe and Adcock and James W. Noel, Esq., its solicitors and files its answer to the cross-bill of the Moore-Mansfield Construction Company herein, in the words following, to-wit:

Answer of Complainant Electrical Installation Company to the Cross-bill of Complaint of the Moore-Mansfield Construction Company.

To the Honorable Judges of said Court:

The Complainant, Electrical Installation Company, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many

errors, uncertainties and imperfections in the said cross-bill of complaint of the said cross-complainant, The Moore-Mansfield Construction Company, contained, for answer thereto, or to so much thereof as complainant is advised it is material or necessary for it to make answer to, answering says:

I.

This complainant admits upon information and belief that said cross-complainant is a corporation organized and existing under and by virtue of the laws of the State of Indiana, and that the defendant the Indianapolis, Crawfordsville & Western Traction Company is also a corporation organized and existing under the laws of said State of Indiana.

That the Electrical Installation Company, complainant in said cause, is a corporation organized and existing under and by virtue of the laws of the State of Illinois; and that the Allis-Chalmers Company, defendant herein, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

Said complainant further admits that said The Marion Trust Company is a corporation organized and existing under the laws of the State of Indiana.

II.

This complainant further admits upon information and belief so much of said cross-complainant's cross-bill of complaint as alleges that on the 21st day of February, 1906, the defendant Traction Company, being the owner of certain franchises, rights-of-way and real-estate situated and located in the counties of Marion, Hendricks, Boone and Montgomery, in the state of Indiana, and being desirous of constructing thereon a certain interurban traction line extending from the City of Indianapolis to the City of Crawfordsville through a portion of said counties of Marion, Hendricks, Boone and Montgomery, entered into a certain contract in writing with said cross-complainant for the construction of its said railroad; but this complainant has no absolute knowledge, and is not sufficiently advised as to the terms of said agreement to state whether Exhibit A filed with said cross-complaint is a copy thereof or not; nor what the exact terms and conditions of said contract were, and said complainant therefore, neither admits nor denies the averments of said paragraph two of said cross-complaint, purporting to set forth the terms of said contract, but asks that said cross-complainant be required to make such proof thereof as it is able to make.

III.

Complainant admits that on or about the 6th day of June, 1906, the said Traction Company, with the knowledge and consent of cross-complainant, entered into a contract with complainant wherein it was agreed that complainant should do all the work and furnish all the materials for the construction and

equipment of the pole line over-head electrical circuit, power house and substation buildings and machinery, repair shop and rolling stock for a single track and turn-outs electric railway to be built from Indianapolis to Crawfordsville for said Traction Company, and that said contract, marked "Exhibit A" and filed with said cross-complaint, was modified accordingly, but complainant is not sufficiently advised to enable it to state with certainty whether or not cross-complainant was thereby entirely relieved from its said contract as to its responsibility for the work so required to be done by complainant, and whether or not cross-complainant was any longer under obligation to perform any of the work or furnish any of the materials covered by and included on the contract with complainant, and as to the respective rights and obligations of the parties thereto, arising under said arrangement, complainant neither admits nor denies the averments of paragraph three of said cross bill of complaint but requires strict proof thereof.

IV.

This complainant admits upon information and belief as alleged in paragraph four of said cross-complaint, that said cross-complainant entered upon the construction of said work, but complainant is not sufficiently advised and has no such definite and certain knowledge as enables it to state whether or not said work was fully completed, nor what the aggregate cost thereof was, nor whether the bill of particulars filed with said cross-complaint, and designated as "Exhibit B" is a correct statement or not.

Complainant admits upon information and belief that said Traction Company paid upon said contract the sum of \$499,714.59, but whether or not any further or additional payments were made upon said contract, nor whether any balance remains unpaid on said contract price, and if so what the true amount of such balance is, this complainant is not advised with such certainty as to enable it to state and, therefore, neither admits nor denies the averments of said paragraph four of said cross-complaint in that behalf.

Complainant has no definite knowledge whether said defendant Traction Company accepted said work as performed and completed by said cross-complainant, nor whether or not there has accrued in favor of said cross-complainant and against said Traction Company a cause of action for \$28,013.75 or not; nor what sums or items said amount claimed by said cross-complainant includes.

As to all matters of facts alleged in said paragraph four of said cross-complaint not herein expressly admitted to be true complainant asks that said cross-complainant be required to make strict proof thereof.

V.

Complainant admits, as alleged in paragraph five of said cross-bill, that subsequent to the execution of said original contract made by said Traction Company with complainant, a certain portion of the work covered by the contract of cross-complainant was by said

Traction Company sublet to complainant, but as to all other allegations of fact contained in said paragraph five complainant has not sufficient knowledge or adequate information to enable it to admit or deny the same, and therefore asks that said cross-complainant be required to make strict proof thereof.

VI.

Complainant has no actual knowledge and has no such certain or definite information as to enable it to state with certainty
267 whether or not said cross-complainant filed, or caused to be filed, a notice of its intention to hold a mechanic's lien upon said property in the counties through which said line of railroad runs, as alleged in paragraph six of said cross-bill; nor if so filed, whether Exhibit C filed with said cross-bill, is a correct copy thereof, nor whether said notices were recorded, as required by law, in the several counties mentioned in said paragraph six.

And Complainant therefore neither admitting nor denying the averments of fact contained on said paragraph six of said cross-bill, asks that cross-complainant be required to make strict proof thereof.

VII.

Complainant is not advised so as to state with certainty the true value of the work and material performed and furnished by said cross-complainant under said contract and therefore neither admits nor denies the allegations of cross-complainant in paragraph seven of its cross-bill, and prays that cross-complainant be required to make strict proof thereof.

VIII.

Complainant is insufficiently advised as to the true value of the services of cross-complainant's attorney in the enforcement of said mechanic's lien, if any exists, and prays the court that if it shall become material or proper in this cause to ascertain the value thereof, cross-complainant be required to make proof.

IX.

Complainant admits that on or about the 25th day of August, 1908, cross-complainant filed its complaint in the Superior Court of Marion County as alleged in paragraph nine of the cross bill herein,
268 that the issues as to said cross-complaint have not been determined and that the same is pending and undisposed of in said Superior Court and as to the further allegations in said paragraph nine, complainant neither admits nor denies the same, but requires proof.

X.

Complainant admits that at the time of filing the said complaint in the Superior Court of Marion County, cross-complainant, said Traction Company, and the defendant, The Marion Trust Com-

pany, Trustee, were all citizens of the state of Indiana, as alleged in paragraph ten of said cross-bill, but complainant is not sufficiently advised to enable it to state with certainty whether or not there was any right in said cross-complainant at said time to apply to this honorable court for relief in its said cause of action against said Trust Company, nor whether any federal questions then or thereafter existed between said cross-complainant and said defendants prior to the appointment of said receiver. Complainant admits that the defendant Guthrie had not obtained judgment against said Traction Company at the time of the filing of cross-complainant's complaint in the Superior Court, but complainant is not advised as to the character of Guthrie's claim prior to judgment, and not being sufficiently advised, cannot answer as to the value or priorities of the judgment of said defendant Guthrie.

XI.

This complainant denies that at and prior to the time of the execution of said contract between said cross-complainant and said Traction Company, or at any other time, it was and had been the settled law of the State of Indiana, that any contractor or sub-contractor performing, or causing to be performed, work, or furnishing or causing to be furnished materials upon any building or structure in the State of Indiana, could, by complying with the mechanic's lien law of the State then existing, maintain and enforce a mechanic's lien for the work and materials so furnished and performed.

269 This complainant further denies that from and after the 10th day of March 1873, or at any other time prior to the alleged completion of its contract by said cross-complainant, any person whether contractor, sub-contractor, laborer, material or supply man, was accorded by the Statutes of the State of Indiana, any right to a mechanic's lien upon railroad property to and for which it had furnished, and caused to be furnished, materials, and on which it had performed, or caused to be performed, labor.

This complainant further denies that it had become and was the settled policy and law of the State of Indiana, as construed by all of its courts, whether those of last resort or nisi prius courts, that said right to take and enforce a mechanic's lien for materials furnished and work and labor performed, existed in favor of contractors and sub-contractors, as well as laborers, material and supply men, or that said cross-complainant had any such knowledge or relied upon any such alleged rights; but this complainant has no knowledge as to what the belief of said cross-complainant was as to its said rights in the premises, nor what influence such belief had, if any, upon the action of said cross-complainant in entering into said contract.

This complainant denies that any of the laws of the state of Indiana referred to by title in paragraph eleven of said cross-bill gave to said cross-complainant, or others in like situation, the right to hold a mechanic's lien for work and labor done and performed, or

materials so furnished, and denies that any of the decisions and opinions of the Supreme Court of said state, referred to in 270 said paragraph eleven by their respective titles, had so adjudged.

This complainant further denies that by reason of said respective statutes of said State, or any of them, nor by reason of said decisions of the courts of said State, or any of them, nor in any other manner, did said cross-complainant acquire any contract right to have, maintain and enforce a mechanic's lien on the line of railroad of said defendant Traction Company under the contract sued on, and denies that the State of Indiana, by the decision of its Supreme Court in the case of *The Indianapolis Northern Traction Company v. Brennan*, referred to in said paragraph eleven, nor by any other decision or in any other manner has undertaken to impair any obligation of the contract sued on, on other contract right of said cross-complainant, or that it is the duty of the courts of said state of Indiana to maintain and enforce any alleged right in said cross-complainant to prosecute or enforce its alleged mechanic's lien upon said railroad property, and denies that the Act of March 1883 of the General Assembly of said state as construed by said Supreme Court, is in violation of any provision of the Constitution of the United States.

This complainant further denies that said cross-complainant has any right now in this action, or otherwise, to enforce said alleged mechanic's lien against the property of said Traction Company described in said cross-bill.

This complainant has no knowledge as to how far, if at all, said Superior Court of Marion County may feel constrained to follow the opinion of the Supreme Court of said State, as announced in said

Indianapolis Northern Traction Company v. Brennan case; 271 but complainant denies that any Federal question has arisen out of said decision.

As to all matters of fact alleged in said paragraph eleven of said cross-complaint not herein admitted to be true or otherwise traversed, confessed or denied, this complainant alleges that it has no adequate information to enable it to state whether such alleged facts are true, or not, and as to each and all of them it asks that said cross-complainant shall be required to make strict proof thereof.

XII.

This complainant admits that the original bill in this cause was filed on the 26th day of June 1909; that said cross-complainant was not made a party defendant to said original bill until, to-wit: the 9th day of July, 1909, when by leave of court said cross-complainant and others described in paragraph twelve of said cross-complainant's said cross-bill, were made additional defendants to said original bill; that on the 9th day of July, 1909, by an order duly and properly entered in said cause, one Harry J. Milligan was duly appointed Receiver of the property and assets of said Traction Company, and duly qualified and entered upon the discharge of his

duties as such Receiver, and said property is now and has ever since remained in the custody and control of this Honorable Court.

As to all matters of fact alleged in paragraph twelve of said cross-bill not herein expressly and specifically admitted or denied this complainant avers that it has no certain and adequate information as enables it to state whether such matters of fact are true or not, and therefore it neither admits nor denies the same, and this complainant asks that strict proof may be required as to all matters alleged in said paragraph twelve not herein expressly admitted to be true.

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XIII.

Complainant further answering said cross-bill, avers that heretofore, to-wit: On or about the 21st day of May, 1906, said defendant Traction Company executed and delivered to the defendant Marion Trust Company, as Trustee, a certain Trust deed covering all of its property of every kind and description, together with all property to be afterward acquired by said Traction Company, a copy of which trust deed is filed with the answer to said cross-bill of the Marion Trust Company, Trustee, is marked "Exhibit A" and is made a part hereof by reference. That said trust deed secured an issue of three thousand (3,000) bonds of the denomination of One thousand dollars (\$1,000.00) each; that pursuant to said trust deed bonds of said issue to the number of 1,500, were for value received duly issued and delivered, and that complainant is the owner of two hundred and eight (208) of said bonds of the face value of Two Hundred and eight thousand dollars (\$208,000), a copy of which said bonds, together with a copy of form of coupon attached thereto, is filed with the said answer of the Marion Trust Company, Trustee, as Exhibit B, and is by reference made a part hereof. That default has been made in the payment of the principal and interest of said bonds from and after the first day of July, 1909, and that after the expiration of more than six (6) months following such default, the holders of the majority of the bonds then outstanding requested the defendant Marion Trust Company to proceed to foreclose said trust deed and said Marion Trust Company, Trustee, has filed its cross-complaint in this cause seeking foreclosure of said trust deed in order to provide for the payment of said bonds.

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XIV.

Complainant further answering alleges: That all the assets of said defendant Traction Company in the hands of said Receiver, including the property covered by said trust deed, and all after acquired property and the income thereof are insufficient to pay said outstanding bonds; that the defendant Traction Company is insolvent; that there are no funds or resources of any kind or description from which any sum adjudged to said cross complainant can be paid without impairing the security of complainant as the holder of said bonds, and complainant therefore says that the rights

of said cross complainant whatever they may be, if any, are junior and inferior to the lien of said trust deed securing said bonds.

Complainant therefore humbly prays that said cross-bill of complaint be dismissed or that in any decree which shall or may be entered in this cause, the rights of complainant as the holder of said bonds shall be fully protected and preserved and that, if the assets of said defendant shall be marshalled and sold as prayed, and the proceeds thereof distributed, that the court order the bonds secured by said trust deed, including the bonds held by complainant, be paid out of the funds derived from such sale before any part thereof is applied to the payment of cross-complainant's alleged claim; without this there is any other matter, cause or thing in said cross-complainant's bill of complaint contained, material or necessary for complainant to make answer to, and not herein and hereby well and sufficiently answered, confessed traversed and avoided or denied, this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

274 And will the court grant unto this defendant such other and further relief in the premises as may seem in accordance with equity.

FYFFE & ADCOCK,
JAMES W. NOEL,

Solicitors for Complainant Electrical Installation Company.

And afterwards, to-wit: at the November Term of said Court, on the 4th day of February 1910, before the Honorable Albert B. Anderson, one of the Judges of said Court, the follow- further proceedings in the above entitled cause were had, to-wit:

Comes now the Indianapolis, Crawfordsville and Western Traction Company by Messrs. Smith, Duncan, Hornbrook and Smith, its solicitors, and files its answer to the cross-bill of the Mansfield Construction Company herein in the words following, to wit:

To the Honorable Judges of said Court:

The defendant, Indianapolis, Crawfordsville & Western Traction Company, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said cross bill of complaint of the said cross complainant, the Moore-Mansfield Construction Company, contained, for answer thereto or to so much thereof as defendant is advised it is material or necessary for it to make answer to, answering says:

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I.

This defendant admits upon information and belief that said cross complainant is a corporation organized and existing under and by virtue of the laws of the State of Indiana, and that the plaintiff, Electrical Installation Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois; and that the Allis-Chalmers Company, defendant herein, is a corpora-

tion organized and existing under and by virtue of the laws of the State of New Jersey.

This defendant further admits that said The Marion Trust Company is a corporation organized and existing under the laws of the State of Indiana.

II.

This defendant further admits so much of said cross bill of complaint as alleges that on the 21st day of February 1906, this defendant being the owner of certain franchises, rights of way and real estate situated and located in the counties of Marion, Hendricks, Boone and Montgomery, in the State of Indiana, and being desirous of constructing thereon a certain interurban traction line extending from the City of Indianapolis to the City of Crawfordsville through a portion of said counties of Marion, Hendricks, Boone and Montgomery, entered into a written contract for the construction of said railroad with the cross complainant, a copy of which as Exhibit A is filed with said cross complaint.

III.

Defendant further admits that on or about the 6th day of June 1906, this defendant with the knowledge and consent of said cross complainant entered into a contract with the Electrical Installation Company *should* do all the work and furnish all the materials for the construction and equipment of the pole line &c., and that said contract marked Exhibit A and filed with said cross complaint was modified accordingly, and the cross-complainant relieved from the performance of the work contracted to be done by said Electrical Installation Company.

IV.

Defendant admits that said cross complainant entered upon the construction of said work, but denies that said work was fully completed. It admits that it paid unto the cross complainant the sum of \$499,714.59, but denies that there is a balance due the said cross complainant of \$28,013.75. It admits that there is some balance due unto the cross complainant on account of such work so done by it, but as to the exact amount due unto it, defendant asks that said cross-complainant be required to make strict proof thereof.

V.

Defendant admits that subsequent to the execution of said original contract made by this defendant with the cross-complainant, a certain portion of the work covered by said contract was by this defendant sub-let to the Electrical Installation Company, but as to the further allegations in paragraph five of said cross-bill, this defendant says it has not sufficient knowledge or adequate information to enable it to admit or deny the same, and therefore asks that said cross-complainant be required to make strict proof thereof.

VI.

This defendant has no actual knowledge and has no such information as enables it to state with certainty whether or not said cross-complainant filed a notice of its intention to hold a mechanic's lien upon the property of this defendant as alleged
277 in paragraph six of said cross bill; nor if so filed, whether Exhibit "C" filed with said cross-bill, is a correct copy thereof, nor whether said notices were recorded, as required by law; therefore this defendant asks that the cross-complainant be required to make strict proof thereof.

VII.

This defendant denies that the work and labor done and performed by the cross complainant and the materials furnished and caused to be procured by it to be furnished in the erection and construction of said railroad were reasonably worth the sum of \$516,733.34, and says such work and labor and materials were of a much less value to-wit: not to exceed the sum of \$500,000.00.

VIII.

This defendant is insufficiently advised as to the value of the services of cross-complainant's attorney in the enforcement of said mechanic's lien, if any exists, and prays the court that if it shall become material or proper in this cause to ascertain the value thereof, that cross-complainant be required to make proof thereof.

IX.

Defendant admits that on or about the 25th day of August, 1908, the cross complainant filed its complaint in the Superior Court of Marion County as alleged in paragraph nine of the cross bill herein; that the issues as to said cross complaint have not been determined and the same is pending and undisposed of in said Superior Court, and that said cross complainant and the Allis-Chalmers Company have, so far as this defendant is aware, at all times insisted upon their right to enforce their mechanic's lien upon said property, and
278 that their lien was senior to the lien in favor of the Marion Trust Company, Trustee for the holders of the bonds issued thereunder and secured by said trust deed.

X.

This defendant admits that at the time of filing said complaint in the Superior Court of Marion County, this defendant, the Marion Trust Company Trustee and the cross complainant were all citizens of the State of Indiana, as alleged in paragraph ten of said cross bill. But this defendant is not sufficiently advised to enable it to state with certainty whether or not there was any right in said cross complainant at said time to apply to this Honorable Court for

relief in its cause of action against said Trust Company, nor whether any federal questions then or thereafter existed between said cross complainant and said defendants prior to the appointment of said Receiver. This defendant admits that the defendant Guthrie had not obtained judgment against it at the time of the filing of said cross complainant's complaint in the Superior Court; but this defendant is not sufficiently advised to answer as to the value or priorities of the judgment of said defendant Guthrie.

XI.

This defendant denies that at and prior to the time of the execution of said contract between said cross complainant and this defendant, or at any other time, it was and had been the settled law of the State of Indiana, that any contractor or sub-contractor performing or causing to be performed, work, or furnishing or causing to be furnished, materials upon any building or structure in the State of Indiana could by complying with the mechanic's lien law of the State then existing, maintain and enforce a mechanic's lien for the work and materials so furnished and performed.

279 This defendant further denies that from and after the 10th day of March 1873 or at any other time prior to the alleged completion of its contract by said cross complainant, any person whether contractor or sub-contractor, was accorded by the Statutes of the State of Indiana any right to a mechanic's lien upon railroad property of and for which it had furnished or caused to be furnished materials and on which it had performed or caused to be performed, labor.

This defendant further denies that it had become and was, the settled policy and law of the State of Indiana, as construed by all of its courts, that said right to take and enforce a mechanic's lien for materials furnished and work and labor performed, existed in favor of contractors and sub-contractors, as well as laborers, material and supply men, or that said cross complainant had any such knowledge or relied upon any such alleged rights; but this defendant has no knowledge as to what the belief of said cross complainant was as to its said rights in the premises, nor what influence such belief had, if any, upon the action of said cross complainant in entering into said contract.

This defendant denies that any of the laws of the State of Indiana referred to by title in paragraph eleven of said cross bill gave to said cross complainant the right to hold a mechanic's lien for any labor done and performed or materials so furnished, and denies that any of the decisions of the Supreme Court of said State referred to in said paragraph eleven by their respective titles, had so adjudged.

280 This defendant further denies that by reason of said respective statutes, or any of them, nor by reason of said decisions of the courts of said State, or any of them, or in any other manner, did said cross complainant acquire any contract right to have, maintain and enforce a mechanic's lien on the line of railroad of this defendant company under the contract sued on, and denies that the State of Indiana by the decision of its Supreme Court

in the case of the Indianapolis Northern Traction company vs. Brennan, referred to in said paragraph eleven, or by any other decision or in any other manner has undertaken to impair any obligation of the contract sued on, or other contract right of said cross complainant, or that it is the duty of the courts of said State of Indiana to maintain and enforce any alleged right on said cross complainant to prosecute or enforce its alleged mechanic's lien upon said railroad property, and denies that the Act of March 6th, 1883 of the General Assembly of said State as construed by said Supreme Court, is in violation of any provision of the Constitution of the United States.

This defendant further denies that said cross complainant has any right now in this action, or otherwise, to enforce said alleged mechanic's lien against the property of this defendant described in said cross bill.

This defendant has no knowledge as to how far, if at all, said Superior Court may feel constrained to follow the opinion of the Supreme Court of said State, as announced in said case of Indianapolis Northern Traction Company v. Brennan; but defendant denies that any federal question has arisen out of said decision.

As to all matters of fact alleged in said paragraph eleven in said cross complaint not herein admitted to be true or otherwise traversed, confessed or denied, this defendant alleges that it has no adequate information to enable it to state whether such alleged facts are true

or not, and as to each and all of them it asks that said cross
281 complainant shall be required to make strict proof thereof.

XII.

This defendant admits that the original bill in this cause was filed on the 26th day of June 1909; that said cross complainant was not made a party defendant to said original bill until to-wit, the 9th day of July 1909, when by leave of court said cross complainant and others described in paragraph twelve in said cross complainant's said cross bill were made additional defendants to said original bill.

That on the 9th day of July 1909, by an order duly and properly entered in said cause, one Harry J. Milligan was duly appointed Receiver of the property and assets of said defendant company and duly qualified and entered upon the discharge of his duties as such Receiver, and said property is now and has ever since remained in the custody and control of this Honorable Court.

As to all matters of fact alleged in said paragraph twelve of said cross bill not herein expressly and specifically admitted or denied, this defendant avers that it has no certain and adequate information as enables it to state as to whether such matters of fact are true or not, and therefore it neither admits nor denies the same, and this defendant asks that strict proof may be required as to all matters alleged in said paragraph twelve not herein expressly admitted to be true.

Defendant therefore humbly prays that said cross bill of complaint may be dismissed in so far as it seeks to have established upon the property of thus defendant any lien right of any character whatsoever, and that as to any amount that may be found due and owing

unto said cross complainant from this defendant, that the same may be established and adjudged as inferior to all lien claims
282 against this defendant; without this there is any other matter, cause or thing in said cross bill of complaint contained, material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided nor denied, this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

And will the court grant unto this defendant such other and further relief in the premises as may seem in accordance with equity.

SMITH, DUNCAN, HORN BROOK &
SMITH,

*Solicitors for said Defendant, Indianapolis,
Crawfordsville & Western Traction Company.*

283 And afterwards, to-wit: at the November Term of said Court, on the 26th day of February 1910, before the Honorable Albert B. Anderson, one of the Judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company by W. A. Ketcham, Esq., its solicitor, and files its replication to the amended answer of the Marion Trust Company, Trustee, and also files its replication to the answer of the Electrical Installation Company, and also files its replication to the answer of the Indianapolis, Crawfordsville and Western Traction Company, which replications are respectively in the words following, to-wit:

*Replication to Answer of Marion Trust Co., Trustee, as Amended,
to the Cross Bill of Moore-Mansfield Construction Company.*

This replicant, The Moore-Mansfield Construction Co., saving and reserving to its self all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, as amended, The Marion Trust Co., Trustee, to the cross bill of said Moore-Mansfield Construction Co., for replication thereunto saith that he doth and will aver, maintain and prove its said cross bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things
284 this replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said cross bill it hath already prayed.

CARSON & THOMSON AND
WILLIAM A. KETCHAM,

*Solicitors for Cross-plaintiff
The Moore-Mansfield Construction Company.*

*Replication to Answer of Electrical Installation Co. to Crossbill of
Moore-Mansfield Construction Company.*

This replicant, The Moore-Mansfield Construction Co., saving and reserving to its self all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, The Electrical Installation Co., to the crossbill of said Moore-Mansfield Construction Co., for replication thereunto saith that he doth and will aver, maintain and prove its said cross bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said cross-bill it hath already prayed.

CARSON & THOMSON AND
WILLIAM A. KETCHAM,
*Solicitors for Cross-plaintiff
The Moore-Mansfield Construction Co.*

285-290 *Replication to Answer of Indianapolis, Crawfordsville
and Western Traction Co. to the Cross Bill of Moore-
Mansfield Construction Co.*

This replicant, The Moore-Mansfield Construction Co., saving and reserving to its self all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, The Indianapolis, Crawfordsville and Western Traction Co., to the cross-bill of said Moore-Mansfield Construction Co., for replication thereunto saith that he doth and will aver, maintain and prove its said cross-bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said cross-bill it hath already prayed.

CARSON & THOMSON AND
WILLIAM A. KETCHAM,
*Solicitors for Cross-plaintiff
The Moore-Mansfield Construction Company.*

291 *Replication of The Electrical Installation Company, Complainant, to the Answer of the Defendant The Marion Trust Company, Trustee.*

This replicant, Electrical Installation Company, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, The Marion Trust Company, Trustee, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct and humbly pray- as in its bill it hath already prayed.

FYFFE & ADCOCK,

JAMES W. NOEL,

Solicitors for Complainant- Electrical Installation Company.

Replication of The Electrical Installation Company, Complainant, to the Answer of the Defendant The Moore-Mansfield Construction Company.

This replicant, Electrical Installation Company, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties
292 and insufficiencies of the answer of said defendant, The Moore-Mansfield Construction Company, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and — this replicant is ready to aver, maintain and prove as this honorable court shall direct and humbly pray- as in its bill it hath already prayed.

FYFFE & ADCOCK,

JAMES W. NOEL,

Solicitors for Complainant, Electrical Installation Company.

293 And afterwards, to-wit, at the November Term of said Court, on the 9th day of March, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company, by Messrs. Carson & Thompson and William A. Ketcham, Esq., its solicitors, and files its answer to the cross-bill of Marion Trust Company, Trustee, in the words following, to-wit:

The Answer of the Moore-Mansfield Construction Co. to the Cross-bill of the Marion Trust Co., Trustee.

This defendant, The Moore-Mansfield Construction Co. now and at all times hereafter saving to itself all and all manner of benefit of exception, or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said cross bill contained, for answer thereto, answering says that it admits:

1. That on the 26th day of June, '09 the complainant filed its original bill of complaint.

2. That the averments thereof were as substantially stated in said cross-bill.

3. That on July 8, '09 the Traction Co. filed its cross-bill praying for the appointment of a Receiver and that it be authorized to make said Marion Trust Co. Trustee, hereinafter called the Trust Co.

and this defendant with others defendants to its cross-bill.

294 4. That on the 9th day of July the complainant by leave filed an amendment to its bill making this defendant, the Trust Co. and other parties defendant.

5. That thereupon Harry J. Milligan was duly appointed Receiver of said Traction Co. duly qualified as such and has ever since been and now is in the discharge of his duties as such Receiver.

6. That this defendant by leave of Court filed its cross-bill as in said answer averred and is more particularly shown in said cross-bill to which this defendant refers for greater certainty.

7. That on to-wit; the 21st day of May, 1906, the Traction Co. executed and delivered to said cross plaintiff, the Trust Co., its certain mortgage or deed of trust upon the property then owned or thereafter to be acquired by said Traction Co. secured the bonds therein described and that thereafter to-wit on the 18th day of August, 1906, the said Traction Co. acquired the certain properties described in said cross-bill for the purpose of constructing thereon its line of railway and appurtenances.

8. That at some time subsequent to the 21st day of May, 1906, the precise date of which this defendant is unable to state, but asks that the cross-plaintiff be required to make proof thereof upon the final hearing the Traction Co. executed and delivered to said cross-plaintiff, as such Trustee, certain bonds aggregating 1,500 in number each of said bonds being for \$1,000 (one thousand dollars) and the aggregate amount of said bonded indebtedness being \$1,500,000 (fifteen hundred thousand dollars) with semi-

295 annual coupons at the rate of 5% attached to each of said bonds, but whether said bonds were duly certified by said Trustee and were duly sold this defendant has no knowledge sufficient to enable it to state and asks that said cross-plaintiff be required to make proof thereof if that fact shall become material as

against this defendant. And the defendant says that at the time of the execution of said mortgage or Trust deed and at the time of the issuing, delivering and sale of said bonds—if they were in fact sold—said Traction Co. was not the owner of any line of railroad whether completed or incomplete, but had simply acquired certain corporate and other franchises looking to the building of a line of railroad and had entered into the contract with this defendant and others for the construction and equipment of its line of railroad upon the grounds that it then owned and was about to acquire. And this defendant and said other parties long prior to the execution of said mortgage or deed of trust had entered upon the work of erecting and constructing said line of railway pursuant to contracts that had been theretofore entered into by said Traction Co. and other parties engaged in the erection and construction of said line of railway and furnishing materials therefore of all which the said Trustee had full notice and knowledge at and prior to the execution and acceptance of said mortgage and trust deed as had also the holders of the bonds

296 to whom the same were delivered by said Trust Co.—so far as such bonds were delivered—By reason whereof the said Trust Co. and the holders well knew that they acquired no lien whatever upon said railway save and except as the same was junior and subordinate to any mechanics' liens that might be acquired and held by any person or persons, who might perform labor or furnish materials for the erection and construction of said railway and more especially this defendant, who had as set forth in its cross bill entered into a contract with said Traction Co. for furnishing materials and performing labor in the erection and construction of said Railway on to wit the 21st day of February, 1906, and at all times between that date and the said 21st day of May, 1906, was engaged in furnishing materials and performing labor in the construction of said Railroad as said Trust Co. and the purchasers and holders of said bonds well knew at and prior to the execution of said trust deed or mortgage and the purchase and sale of said bonds, if any of said bonds were in fact delivered and sold.

9. Defendant admits that the provisions alleged in said cross bill with respect to default in the payment of interest and the proceedings thereon were contained in said trust deed or mortgage and that default was made by said Traction Co. in the payment of interest as alleged and that the proceedings alleged were taken by said Trust Co. pursuant to said trust deed or mortgage and that demand for payment was made upon said Traction Co. for payment which was refused and the whole of said bonds so far as properly issued and sold are now due and unpaid.

297 10. That said Traction Co. is insolvent; that it is necessary that said receivership should be continued; that the assets of said company should be marshalled and the priority of liens and the extent thereof upon said railroad property be determined and decreed; that until a sale under such decree can be had, said railroad shall be operated by said Receiver as a going concern in order to protect its property and enable it to comply with its public duties and thereby preserve its franchises and that upon a sale of the property

as a whole the proceeds thereof may be distributed to the parties thereto entitled.

11. That this defendant has a valid and subsisting lien upon the railroad property of said Traction Co., but defendant denies that it is junior and subordinate to the lien of said cross plaintiff, but alleges that it is senior and paramount to the lien of said cross plaintiff's mortgage as set forth in this defendant's cross bill, to which this defendant refers as to the other named parties. This defendant has no knowledge as to whether they have or have not liens or what their priority is except that none of them has priority over this defendant.

12. As to whether the Sinker Davis Co. has filed its intervening petition and thereon has a just claim entitled to be paid as a preferred claim, defendant is not sufficiently advised to enable it to answer except that if it has such a claim it has no priority over the claim of this defendant as set forth in its cross-bill to which this defendant refers as a part of this answer.

298 13. As to whether the said Edwards and others have any just claim for the indebtedness alleged, this defendant has no knowledge except that whatever claim—if any they have is junior and subordinate to the claim of this defendant, as set forth in its said cross-bill to which it refers as a part of its answer.

14. As to the claim of said Guthrie this defendant avers that if any he have it is junior and subordinate to the lien set forth in the cross-bill of this defendant to which it refers and thereby makes the same a part of this, its answer.

15. As to the controversy between said cross-plaintiff and said Sinker-Davis Co. this defendant says it is in nowise concerned therewith, and has no knowledge of the merits of said controversy sufficient to enable it to make answer.

16. As to whether said bonds in number aggregating fifteen thousand and in amount \$1,500,000.00 were sold by said Traction Co. for full value to bona fide purchasers for the purpose of procuring funds to be used and which were procured and used in the construction and equipment of said Traction Company's line of railway, defendant says that it is advised to the contrary and asks that said cross-plaintiff be required to make proof thereof upon the final hearing of this cause.

17. As to whether the property of said Traction Co. is or is not sufficient to protect said bond-holders and to pay the full amount of said bonds with interest, this defendant has no sufficient knowledge to enable it to answer but it says with respect thereto:

299 1. That said bonds were not in their entirety properly placed upon the market and sold for the purpose of procuring the funds with which to construct said road, and

2. That if they were, as appears by the cross-bill of this defendant to which it refers the lien of said mortgage and deed of trust, is junior and subordinate to the lien of this defendant as alleged in its said cross-bill.

18. As to the dealings between the said consolidated Traction — and the Indianapolis, Crawfordsville & Western Traction Co. this de-

defendant has no knowledge sufficient to enable it to answer as to the averments therein contained, and therefore, denies the same and asks that the cross-plaintiff be required to make proof thereof, and further answering says upon information and belief that the said Consolidated Traction Co. had never anything but a paper existence, that it had never constructed or attempted to construct a line of railway and that a large number of the bonds that are now claimed to be now outstanding and valid liens upon said railway property were by said Trustee and said Traction Co. transferred and delivered without sufficient consideration to the Consolidated Traction Co. for the use of its promoters or to said promoters, who were at the same time the promoters of said Traction Co. and that said Traction Co. never received value for the bonds so transferred and defendant, therefore, asks that said cross-plaintiff be required to make proof of the dealings between said two companies and their respective promoters and says that in any contingency the lien evidenced by 300-302 said mortgage and trust deed is junior and subordinate to the lien of this defendant, as set forth in its cross-bill herein, to which it refers as a part of its answer.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said cross bill charged; without this, there is any other matter, cause or thing in said cross complainant's said cross bill of complaint contained material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed, touching the matters and things in said cross bill alleged and set forth with its reasonable costs and charges in this behalf most wrongfully sustained.

CARSON & THOMPSON &
WILLIAM A. KETCHAM,
Sol's for Def't Moore-Mansfield C. Co.

303 And afterwards, to-wit, at the November Term of said Court, on the 29th day of March, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Marion Trust Company, Trustee, by Messrs. Miller, Shirley & Miller, its solicitors and files its replication to the answer of the Moore-Mansfield Construction Company in the words following, to-wit:

Replication of the Marion Trust Company, Trustee, to the Answer of the Moore-Mansfield Construction Company to the Cross Bill of said The Marion Trust Company, Trustee.

This replicant, The Marion Trust Company, Trustee, saving and reserving to itself all and all manner of advantages of exception which may be had or taken to the manifold errors, uncertainties

and insufficiencies of the answer of the defendant The Moore-Mansfield Construction Company, for its replication thereunto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

304-316

WHITTINGTON & WILLIAMS,
MILLER, SHIRLEY & MILLER,
Solicitors for said Cross-Complainant.

317 And afterwards, to-wit, at the November Term of said Court, on the 5th day of April, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Marion Trust Company, Trustee, and the Moore-Mansfield Construction Company by counsel, and file their stipulation herein, in the words following, to-wit:

Stipulation Between the Marion Trust Company, Trustee, and the Moore-Mansfield Construction Company.

It is hereby stipulated between The Marion Trust Company, Trustee, cross-complainant, and The Moore-Mansfield Construction Company, one of the defendants to the cross-bill of said The Marion Trust Company, Trustee, that the averments of paragraph XI of the cross-bill of said The Marion Trust Company, Trustee, shall, without formal amendment, as between the parties to this stipulation, be deemed to embrace the specific averments of fact contained in the amendment of the answer of said The Marion Trust Company, Trustee, to the cross-bill of complaint of said The Moore-Mansfield Construction Company, which amendment was filed on the 29th day of January, 1910, relating to the contract of June 6, 1906, referred to in the cross-bill of said The Moore-Mansfield Construction Company, and that all evidence which would be available under said cross-bill of said The Marion Trust Company, Trustee, if said specific averments of fact were formally incorporated therein, may be admitted and considered thereunder without amendment.

318-382

CARSON & THOMPSON (K) &
W. H. KETCHAM,
Solicitors for Cross-Complainant,
The Moore-Mansfield Construction Co.
WHITTINGTON & WILLIAMS,
MILLER, SHIRLEY & MILLER,
Solicitors for Cross-Complainant,
The Marion Trust Company, Trustee.

383-416 And afterwards, to-wit, at the May Term of said Court, on the 24th day of October, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, towit:

It is ordered by the court that the above entitled cause be and the same is hereby referred to Edward Daniels, Esq., Master in Chancery, who is directed to take such testimony herein as may be necessary and to report the same together with his finding of facts to this Court with all convenient speed.

* * * * *

417 THE MARION TRUST COMPANY, Trustee,
v.
INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION COMPANY
et al.

Cross-Complaint.

Report of the Master in Chancery.

To the Honorable Judge of said Court:

In pursuance and by virtue of an order of reference made in the above entitled cause by the Honorable Albert B. Anderson, Judge of said Court dated the — day of —, 1910, in and by which it was ordered that the said cause be, and the same thereby was, referred to the standing Master in Chancery of said Court, and he was thereby made the Master in said cause and directed to take the testimony therein and report the same, together with his findings of fact to said Court:

Now, Therefore, I, the undersigned United States Master in Chancery of said Court, respectfully report that I have taken the proof offered in behalf of the complainant and de-defendants, and also in behalf of the respective cross complainants and defendants to the said respective cross bills of complaint, and herewith report the same, together with stipulations of the parties respecting certain facts in issue in said cause, which proofs and respective stipulations were all taken in shorthand by Rowland Evans, the official reporter of said Court and thereafter transcribed in typewritten manuscript and bound in two volumes identified by said Master's signature, and marked Exhibits "1" and "2," respectively, and herewith filed as part of this report.

418 And after having heard the evidence and the oral argument of counsel for the respective parties, and now being well advised, respectfully find and report the following facts, to-wit:

I.

The complainant, the Electrical Installation Company is, and was at the time its bill of complaint was filed herein, a corporation organized and existing under the laws of the State of Illinois, and a citizen and resident of said state having its principal place of busi-

ness in Chicago; and that the defendant Indianapolis, Crawfordsville & Western Traction Company is, and since long prior to the filing of said bill of complaint has been, a corporation organized and existing under and by virtue of the laws of the state of Indiana, and a citizen and resident of said state of Indiana; that the defendant (and cross complainant), the Moore-Mansfield Construction Company was at the time said bill of complaint was filed, ever since has been, and is now, a corporation, organized and existing under and by virtue of the laws of the said state of Indiana, and a citizen and resident thereof; that the defendant (and cross-complainant) William A. Guthrie, is and has been ever since said bill of complaint was filed a citizen and resident of the state of Indiana; and that the defendant (and cross-complainant) The Marion Trust Company (trustee under the mortgage or deed of trust hereinafter described) was at the time said bill of complaint was filed, ever since has been and is now, a corporation organized and existing under the laws of the State of Indiana, and a citizen and resident of said State.

The amount in controversy upon said original bill of complaint of said Electrical Installation Company, exclusive of interest 419 and costs exceeds the sum and value of Two Thousand (\$2,000) Dollars.

II.

At the time said original bill of complaint was filed in this cause the defendant, Indianapolis, Crawfordsville & Western Traction Company was indebted to said complainant in the sum of \$3,671.65, with interest from the first day of January, 1909, all of which was then and is still due and unpaid.

III.

That on the 21st day of May, 1906, pursuant to and by authority of resolutions of the stockholders and Board of Directors of said defendant Indianapolis, Crawfordsville & Western Traction Company, theretofore duly and regularly adopted, said defendant made, executed and delivered its certain mortgage or deed of trust to the cross-complainant and defendant, The Marion Trust Company of Indianapolis, Indiana, trustee, whereby its railroad and all other property, rights, franchises and assets of every kind then owned by it, or thereafter acquired by it for its railroad purposes, were conveyed to said trustee to secure certain bonds which were at that time duly executed and delivered, pursuant to said mortgage or deed of trust, and the authority theretofore granted by said stockholders and Directors of said Indianapolis, Crawfordsville & Western Traction Company; said mortgage or deed of trust being the same as that sued upon and described in the cross-complaint of said The Marion

Trust Company, trustee, a copy of which is attached to said 420 cross-bill of complaint of said The Marion Trust Company, trustee, and marked Exhibit "A"; and the same is hereby made part of this report by reference; which mortgage was duly recorded in the offices of the respective recorders of the several counties through and into which said defendant's railroad extended,

as follows: Marion County, Indiana, May 24, 1906, in Mortgage Record 476, page 551; also Chattel Index 28; in Hendricks County, Indiana, on May 25, 1906, in Mortgage Record 48, page 350; in Boone County, Indiana, on May 25, 1906, in Mortgage Record 59, page 421; in Vermillion County, Indiana, on May 25, 1906, in Mortgage Record 22; in Warren County, Indiana, on May 26, 1906, in Mortgage Record 27, at page 194; in Fountain County, Indiana, on May 25, 1906, in Mortgage Record 21, and in Montgomery County, Indiana, May 26, 1906, in Mortgage Record 74, page 479.

That at the time said mortgage or deed of trust was executed and recorded, and at all other times since the organization of said defendant Indianapolis, Crawfordsville & Western Traction Company, said mortgager resided and had its principal office and place of business in said Marion County, Indiana.

IV.

That said mortgage or deed of trust was so executed to secure an authorized issue of three thousand bonds of the denomination of one thousand (\$1,000) Dollars each; fifteen hundred of which, numbered from 1 to 1,500, both inclusive, were duly sold, issued, delivered and certified by the trustee of said mortgage long prior to the filing of said original bill of complaint, and have ever since
421 been and are now unpaid and outstanding; and that the remaining 1,500 of said bonds remain still unissued and uncertified in the hands of said defendant Traction Company.

Under date of February 21, 1906, a certain written agreement, wherein the Indianapolis, Crawfordsville and Western Traction Company was party of the first part and divers individuals, designated in the instrument as subscribers, were parties of the second part, was executed. This agreement is called the Underwriting Agreement, and it made provision for the sale of stock and bonds of the said Traction Company. The said subscribers became the purchasers of practically all of said 1,500 bonds. Among other provisions, it contained a provision, designated 1, which is as follows:

"Each party whose name is hereto subscribed, severally undertakes and agrees to, and does hereby purchase from the Traction Company, bonds and shares of the capital stock of said Company in equal amounts, par value of each, to the aggregate amount set opposite the name of such person, at and for the price of four hundred and fifty dollars (\$450.00) with accrued interest, for each thousand dollars (\$1,000) par value of such bonds and four hundred and fifty dollars (\$450.00) with accrued interest for each one thousand dollars (\$1,000) of stock, par value, and undertakes and agrees with said Traction Company to pay the price thereof at said rate in instalments as follows: Ten percentum on or before the first day of each month thereafter until full sum is paid."

That at the time said original bill of complaint was filed by said Electrical Installation Company said Electrical Installation Company was the owner of two hundred and eight (208) of said outstanding bonds.

Each of said 1,500 bonds now outstanding, together with the coupons and trustee's certificates thereto attached, is of like
422 tenor and effect with the copy thereof filed with, attached to and made part of said cross-bill of complaint of said The Marion Trust Company as Exhibit "B," except as to the serial numbers thereof and the respective dates of maturity of said several coupons.

V.

That at and before the filing of said original bill of complaint said defendant Indianapolis, Crawfordsville & Western Traction Company had made default in the payment of certain coupons due January 1, 1908, attached to bonds numbered as follows: 151 to 156, both inclusive; 252 to 258, both inclusive; 729 and 730, owned by William Mitchell of Lafayette, Indiana; also coupons maturing January 1, 1908, of bonds numbered from 157 to 170, both inclusive, and numbers 513 to 519, both inclusive, belonging to George P. Haywood of Lafayette, Indiana; also forty coupons due January 1, 1908, and forty coupons due July 1, 1908, and forty coupons due January 1, 1909, owned by the Estate of A. F. Ramsey; also thirty-five coupons due July 1, 1908, owned by the Estate of Eli P. Baker.

That all of said coupons so maturing January 1, 1908, remain still due and unpaid, and that the same were presented for payment, and payment refused, at the time of the maturity thereof and repeatedly thereafter.

That on the 1st day of January, 1909, said defendant Indianapolis, Crawfordsville & Western Traction Company again defaulted in the payment of a portion of the interest coupons then maturing, although payment therefor was duly requested; and that on July 1st,

1909, said defendant defaulted in the payment of all coupons
423 then maturing, in the sum of \$37,500, payment for which was duly requested by the respective holders of bonds to which the same were attached, and that said defendant has defaulted in the payment of all interest coupons maturing since said last mentioned date; that each and all of said coupons, in payment of which default was made, as aforesaid, still remain unpaid.

VI.

That said defendant, Indianapolis, Crawfordsville & Western Traction Company was insolvent at the time said original bill of complaint was filed, and for a long time prior thereto, and that the same has ever since continued to be and now is insolvent.

That at the time of filing said original bill of complaint and at the time of the appointment of the Receiver in this cause the said defendant was unable to meet maturing obligations and that its entire assets, franchises and property of any and every description whatever were less in value than the amount of its undisputed outstanding liabilities; at said times defendant, William A. Guthrie, was asserting against the property of said defendant a claim for two thousand and sixty-five dollars and eight cents (2,065.08), which claim had been reduced to judgment and said Guthrie was at said

times asserting that the same was a lien upon said property prior to the mortgage bonds of said defendant Company; and at said times the defendant and cross-complainant herein, the Moore-Mansfield Construction Company was asserting a mechanic's lien upon said property of the defendant Construction Company for and in the sum of twenty-eight thousand dollars (\$28,000.00) and was

424 at said times prosecuting suit therefor in the Superior Court of Marion County and asserting the priority of said claim as a lien against the railroad property of defendant; and at the time of the filing of the bill herein the Allis-Chalmers Company was claiming and asserting a mechanic's lien against the property of the defendant in the amount of thirty-one thousand dollars (\$31,000), and claiming priority therefor as against said mortgage bonds and was prosecuting the same in the Superior Court of Marion County, and said last three named parties were at all of said times contesting the right of the mortgagees herein to a first lien upon the property described in the mortgage of the defendant and cross-complainant, Marion Trust Company, trustee.

That at the time of the filing of the original bill herein and of the appointment of the Receiver in this cause certain parties claiming to be common stockholders of the defendant Traction Company, were claiming that said Traction Company was indebted to them in the amount of ninety-seven thousand dollars (\$97,000) and claiming that said indebtedness was evidenced by trust certificates issued by certain operating trustees of said defendant Traction Company under an alleged trust agreement and were asserting said indebtedness as due and unpaid and were pressing defendant Traction Company for the payment of the same; and at said times certain promissory notes for the sum of more than sixty thousand dollars (\$60,000) held and claimed by various and sundry persons to have been issued by said defendant Traction Company were by their terms past due and unpaid, together with six per cent (6%) interest thereon,

425 and that said notes and the principal sums thereof were in default and the holders thereof were pressing said defendant Traction Company for payment thereof; and at the time of the filing of the original bill in this cause and at the time of appointment of the Receiver herein sundry persons, firms and corporations claiming to be general creditors of the defendant Traction Company in the amount of more than Six thousand dollars (\$6,000) were pressing their said claims for payment and that at said time various damage suits were pending against said Traction Company for personal injuries claimed by the plaintiffs in said suits to have been sustained by them respectively, and that at said time said defendant traction company had neither funds nor the power to raise funds with which to pay the claims of said creditors or any of them.

That on the 8th day of July, 1909, under and pursuant to an order of this court on said date made and entered, Harry J. Milligan was appointed receiver to take possession, control and management of the railway of the defendant Traction Company and said Harry J. Milligan as Receiver so appointed has ever since been in the possession of and has controlled, managed and operated the railway prop-

erty of said defendant Traction Company, and is now in the possession of and operating the same under said appointment and order.

VII.

That on the 21st day of February, 1906, said defendant Indianapolis, Crawfordsville & Western Traction Company, being
426 then the owner of certain franchises, rights of way and real estate situated and located in the counties of Marion, Hendricks, Boone and Montgomery in the state of Indiana, and being desirous of constructing thereon an interurban traction line extending from the city of Indianapolis to the city of Crawfordsville through a portion of said counties of Marion, Hendricks, Boone and Montgomery, entered into a certain contract in writing with the defendant (and cross complainant) the Moore-Mansfield Construction Company, a copy of which is filed as Exhibit "A" and made part of the cross-complaint of said The Moore-Mansfield Construction Company, heretofore filed in this cause, and the cause is by reference made part of this report, whereby said cross-complainant The Moore-Mansfield Construction Company undertook among other things to furnish all materials, machinery, equipment, labor, etc., and to equip and put into operation upon said right of way according to the plans and specifications to be furnished by said Traction Company that portion of its interurban railroad extending from the city of Indianapolis to the city of Crawfordsville, to be completed to the acceptance of the engineer and the Executive Committee of the Board of Directors of said Traction Company according to the terms and conditions of said written contract. And said defendant, Indianapolis, Crawfordsville & Western Traction Company, on its part, in consideration of such erection and construction undertook and agreed to pay to said cross-complainant, Moore-Mansfield Construction Company, a sum equal to the cost thereof, plus 12½% of such cost, the same to be computed on all pay rolls, cost of machinery, supplies, equipment, buildings, insurance, and all
427 other charges paid through said cross-complainant incident to the completion of said line, except that no commission should be paid on \$187,000 of bonds and \$375,000 of stock to be delivered to the Consolidated Traction Company, one of the defendants in this cause, in payment for the right of way grade, as then located and constructed, and other property and rights, nor for the materials on hand nor for the personal time of the officers of said Construction Company.

That among the provisions of said contract between said Indianapolis, Crawfordsville & Western Traction Company and said The Moore-Mansfield Construction Company was one designated as I, as follows:

"The contractor undertakes and agrees to furnish all materials, machinery, equipment, labor, etc. to be purchased in the name of The Moore-Mansfield Construction Company, and to construct and equip and put in operation upon a right of way which the Traction Company agrees to provide, according to plans and specifications

to be furnished by the Traction Company, that part of the street and interurban Street railroad of the Traction Company, extending in and from the city of Indianapolis to and within the city of Crawfordsville; the same to be completed to the acceptance of the engineer and the Executive Committee of the Board of Directors of the Traction Company, and to be free and clear of any claim and demand created by or against the Construction Company for which any lien has been or could be taken upon the railroad or any other property of the Traction Company, or for which said Traction Company or its railroad or any other property, has been or could be made liable."

Said contract contained also the following provision, designated 9, and reading as follows:

"9. No contract for supplies, machinery, equipment or material of any kind involving the expenditure of the funds of the Traction Company shall be entered into by the Construction Company without the approval of the Executive Committee of the Traction Company."

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VIII.

That thereafter, to wit: on the 6th day of June, 1906, said defendant Indianapolis, Crawfordsville & Western Traction Company entered into a contract with said complainant, Electrical Installation Company and said The Moore-Mansfield Construct- Company, a copy of which is as follows, to wit:

"This Agreement, made this 6th day of June, A. D. 1906, and executed in triplicate between the Indianapolis, Crawfordsville & Western Traction Company, a corporation organized under and by virtue of the laws of the State of Indiana, and hereinafter referred to as the "Railway Company," party of the first part, and Electrical Installation Company, a corporation duly organized under and by virtue of the laws of the State of Indiana, hereinafter referred to as the "Contractor," party of the second part, Witnesseth: That,

Whereas, the Railway Company by virtue of its charter, is authorized to construct and operate a line of electric railway from the city of Indianapolis, Indiana, via Clermont, Brownsburg, Pittsboro, Raintown, Lizton, Jamestown, New Ross, Mace, Crawfordsville, Waynetown, Hillsboro, Veedersburg, Covington, Indiana, to the Indiana-Illinois state line east of the city of Danville, Illinois; and

Whereas, the Railway Company, has procured a private right of way from the city limits of Indianapolis to the city of Crawfordsville, and has procured franchises in the several towns between these points and a contract with the Indianapolis Traction & Terminal Company, providing for an entrance to the Terminal Building in Indianapolis, and has completed the grading of roadbed ready for the ties; and

Whereas, the Railway Company has entered into a contract with The Moore-Mansfield Construction Company, of Indianapolis, Indiana, covering the construction of the track, bridges, culverts, etc.; and

Whereas, the Railway Company has duly authorized an issue of \$3,000,000 of its first mortgage 5 per cent, 30-year gold bonds secured by mortgage on all of its property now owned and hereafter to be acquired, and has set apart for the construction and equipment of its line from the city of Indianapolis to and in the city of Crawfordsville \$1,500,000 par value of such bonds and \$1,500,000 par value of its capital stock; and

429 Whereas, an underwriting agreement dated February 21, 1906, with reference to the bonds and stock herein mentioned, has been duly executed between the said Railway Company and certain persons mentioned in said underwriting agreement as the "Subscribers," and under said agreement at the date of the execution of this contract, namely, June 6, 1906, not less than 900 bonds of the par value of \$900,000 have been in good faith subscribed for by responsible parties; and

Whereas, a copy of this contract has been deposited with the Marion Trust Company, Indianapolis, Indiana, the Trustee of the bonds herein mentioned; and

Whereas, the Contractor proposes to undertake the construction and equipment covered by the attached specifications:

Now, Therefore, in consideration of the promises and of the mutual agreements and considerations herein expressed,

It is hereby agreed:

I.

The Contractor undertakes and agrees to do all the work and furnish all the materials for the construction and equipment of the pole line, overhead electrical circuits, power house and sub-station buildings and machinery, repair shop and rolling stock for a single track and turnouts electrical railway to be built from Indianapolis to Crawfordsville for the Railway Company, in all respects according to the specifications hereto attached and made a part hereof, all of which work shall be completely done and finished on or before the first day of March, 1907, unless the Contractor shall be delayed by any cause mentioned in Clause II.

II.

The Railway Company hereby agrees to provide the Contractor with all necessary rights of way and permits and real estate for location of power house and sub-station buildings, and save the Contractor harmless from loss occasioned by lack of such rights of way, permits and real estate, or from delays caused by municipal, corporate or individual interference with the progress of the work after same shall have been started, where such interference grows out of anything done or omitted by the Railway Company, or is the act of its own officers or employees, and agrees that the Contractor shall not be held responsible for work done, material furnished or repairs made by others, and the Contractor shall not in any event be held responsible or liable for any loss, damage, detention or delay caused by fire, strikes, civil or military authority, insurrection or
430 riot, failure of other contractors or by any other cause beyond control of the Contractor.

III.

The Railway Company agrees not to hinder the Contractor from prosecuting the work uninterruptedly from start to finish, and agrees that that portion of the construction work which is to be done by The Moore-Mansfield Construction Company shall be completed free from any claim of indebtedness, the holders of which may under the laws of the State of Indiana or of the United States be entitled to a lien of any kind against any of the property of the Railway Company, so that the Railway Company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said Railway Company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana.

IV.

The Railway Company shall have the right to make changes in the plans and specifications for the work to be done and materials to be furnished by the Contractor, and where such changes add to the work to be done or materials furnished, there shall be added to the contract price as the entire compensation to be paid the Contractor therefor, the cost of such changes plus ten per centum of such cost, and where such changes reduce the work to be done or materials furnished, there shall be deducted from the contract price the cost plus ten per centum of doing the work or furnishing the materials embraced in such changes. No change in the plans or specifications, whether involving an increase or decrease of work to be done or materials furnished, shall be made by the Railway Company without notifying the Contractor in writing thereof. In case it becomes necessary during progress of the work to excavate any rock, the Contractor shall notify the Engineers of the Railway Company of such necessity before proceeding with such work, and if found by such Engineers to be necessary, such excavation shall be regarded as extra work. The Contractor shall have no allowance for rock excavation or other extra work or materials unless it makes claim therefor in writing to said Engineers before allowance of the estimate for the month in which the work is claimed to have been done or materials furnished, nor for any extra work, including rock excavation, or any extra materials, unless the same shall have been required or authorized by the said Engineers before the same was done or furnished. The Contractor shall, as full compensation for all extra work and materials, including rock excavation, be allowed the cost thereof, plus ten per centum.

The Contractor agrees to provide for and carry at its own cost insurance against personal injury to all persons in its employ engaged in this work, and against personal injury to the public, and save the Railway Company harmless from loss on account of personal injury to Contractor's employes or to the public when such injury is caused by carelessness or neglect of the Contractor.

The Contractor also agrees to carry, during construction, fire insurance for the protection of both parties according to their respective interests upon all insurable property covered by this contract, except copper, iron wire and other metals.

The Contractor agrees to provide temporary crossings, red lights or other danger signals where necessary and shall remove all surplus material or debris, leaving the streets and sidewalks in good condition.

The Railway Company agrees to require all other contractors doing any work along this line to carry liability insurance for their own account.

VI.

The Railway Company shall have the right, before final acceptance of the work done and materials furnished under this contract, to reject any work or material furnished by the Contractor, found defective, and require the Contractor to provide other work or material to replace the same within reasonable time, provided, however, that the Railway Company shall appoint, whenever requested by the Contractor, a duly and fully authorized representative to inspect poles and lumber at point of shipment, and it is agreed that the inspection of such representative shall be at the Railway Company's expense and shall be final in all respects.

VII.

Should the Railway Company be allowed by the Contractor under a mutually satisfactory arrangement to do any portion of the construction work, it is agreed that the Railway Company shall pay the same rate of wages to men of the same class as is paid by the Contractor; and the Railway Company shall on or before the commencement of operating the road, render an accounting to the Contractor of the cost of all work not included in this contract, so that both parties to this agreement may have exact knowledge of the value of all property underlying the bonds.

VIII.

The Railway Company shall have a competent and experienced engineer and a competent inspector of the work. Both of these men shall be of recognized ability and experience in their respective lines and their services shall be available to the contractor at all reasonable times, so that prompt and intelligent decisions may be given as the work progresses and so that estimates may be promptly passed upon when due.

IX.

The Railway Company agrees that it will not offer for sale any of the bonds on its line between Indianapolis and Crawfordsville at less than 90 per centum of the par value thereof and accrued interest, without first submitting the terms of such offer to the contractor and obtaining the contractor's approval in writing. The provisions of this article shall be in force up to July 1, 1907.

X.

It is further agreed by and between the parties hereto that in consideration of the materials, apparatus and labor furnished by the contractor that the Railway Company shall pay the contractor the sum of five hundred and sixty thousand dollars (\$560,000), as follows:

For copper:

100 per cent., payable on delivery F. O. B. cars Indianapolis, Crawfordsville or intermediate points.

For all machinery and apparatus, also for cars and trucks:

50 per cent. payable by sight draft with bill of lading or shipping receipt attached.

Balance of 50 per cent. on machinery and apparatus, cars and trucks, shall be due and payable 30 days after date of bill of lading or shipping receipt. The contractor shall have the right to control the movement, routing and place of delivery of all material, machinery, apparatus and equipment covered by this contract, but the same shall not be delivered unnecessarily or unreasonably in advance either in time or amount of the requirements for its use in the progress of construction, and to this end the contractor shall consult with H. A. Mansfield, of The Moore-Mansfield Construction Company as to the advisable time for shipment.

For all other material and for all labor estimates shall be rendered to the Railway Company by the contractor on or about the
433 first of each month after the commencement of work or delivery of materials. Each such estimate shall include all materials delivered and labor performed during the preceding month. In order to facilitate the calculation of accrued interest on bonds, it is agreed that the due date of each estimate shall be considered as the first day of the month following the month for which the estimate is made, and that each estimate shall be payable on presentation to the Railway Company by the contractor, and approved by the Railway Company's engineers.

Estimates shall be regarded as approximately correct and shall be considered as partial payments during construction and such payments shall not be construed as an acceptance of the work and materials on account of which they are made, but the operation of electric cars for profit after the 15-day test provided for in the specifications shall constitute an acceptance by the Railway Company of all that portion of the work, material and apparatus used in the operation of such cars.

The contractor agrees to accept in part payment for all material, apparatus and work to be furnished under this agreement first mortgage 5 per cent gold bonds of the Railway Company to the amount of two hundred and twenty-five thousand dollars (\$225,000) par value and common stock of said Railway Company to the amount of two hundred and twenty-five thousand dollars (\$225,000) par value. The contractor agrees to accept the above named bonds and stock in

payment of two hundred two thousand five hundred dollars (\$202,500) of the contract price hereinbefore mentioned, and it is agreed that to facilitate the calculation of payments due, they shall be paid approximately two-thirds in cash and one-third in bonds and stock at the rate aforesaid. It is understood that the stock remains in the hands of the Trust Company as provided in the underwriting.

The accrued interest on coupons shall be adjusted at the expiration of the interest period, at which time the contractor shall collect from the Trustee cash in full for all coupons owned by the contractor and credit the Railway Company on the next estimate the interest from the commencement of said interest period up to the date the bonds become due the contractor under the provisions of this agreement. It is agreed that no interest coupons shall be clipped from any bonds until the expiration of the interest period, and the Railway Company agrees that the Trustee shall be provided with funds to meet interest coupons promptly on the due date thereof during the progress of work under this contract.

XI.

The contractor shall not be required to commence work or delivery of materials under this contract until all of the bonds of the Railway Company covering its line between Indianapolis and Craw-

434 fordsville, Indiana, have been signed and certified by the Trustee, and the Railway Company shall thereupon cause to be set aside in the hands of the Trustee all of the bonds and stock to be issued to the Contractor or its order under this agreement. The Railway Company agrees to furnish the contractor with a written statement of the Trustee to the effect that the said bonds and stock have been set aside in accordance with this clause. Each order on the Trustee for bonds and stock in favor of the contractor shall be signed by the President and attested and sealed by the Secretary of the Railway Company. Each order shall be executed in triplicate, one copy for the Trustee, one for the contractor and one for the Railway Company.

XII.

To insure the faithful performance by the contractor of its duties under this contract it is agreed that seven and one-half per centum of the whole amount of each estimate allowed the contractor for materials, apparatus or work furnished under the provisions of this contract shall be retained out of the bonds and shares of stock which the contractor is to make in part payment of such estimate, at the rate at which the same are to be taken in payment as herein provided, viz: 90 per centum of par value, which retained bonds and shares of stock shall not be delivered to the contractor until the completion of its work under this contract and acceptance of the same as herein provided. But such percentage shall not be retained from the amounts allowed the contractor for extra work, nor shall the provision hereinbefore mentioned for part payment in bonds and shares of stock apply to amounts due for extra work, which shall be paid in full in cash.

XIII.

The Moore-Mansfield Construction Company hereby approves all and singular the terms, agreements, provisions and conditions of this contract, and the specifications in connection therewith, and agrees that it will do all acts necessary to the carrying out of this agreement so far as the same relates to Moore-Mansfield Construction Company, and it is agreed that the covenants of this agreement shall extend to and bind the successors, assigns and representatives of the Railway Company and contractor.

XIV.

The expressions "The Engineers of the Railway Company" and The Railway Company's Engineers," as used in this contract and the specifications attached hereto, are understood to mean George F. Huggins and H. A. Mansfield, and in case of the death or inability of either to act, the person substituted for him by the Railway Company. If they are unable to agree as to any matter for their decision, they shall select a disinterested umpire of recognized ability. Said Huggins is recognized by the contractor as a competent and experienced engineer within the requirement of Article VIII of this contract.

In witness whereof, the said Indianapolis, Crawfordsville & Western Traction Company has caused its corporate name to be signed hereto by its President and its corporate seal to be hereto affixed by its Secretary, and said Electrical Installation Company has caused its corporate name to be signed hereto by its Vice-President and its corporate seal affixed hereto by its Secretary, and The Moore-Mansfield Construction Company has caused its corporate name to be signed hereto by its President and its corporate seal to be hereto affixed by its Secretary, this 6th day of June, A. D. 1906.

INDIANAPOLIS, CRAWFORDSVILLE &
WESTERN TRACTION COMPANY,

By A. F. RAMSEY, *President*.

Attest:

EDWARD HAWKINS, *Secretary*.

[SEAL.]

ELECTRICAL INSTALLATION COMPANY,
By CHARLES H. KIMBALL, *Vice-President*.

Attest:

A. M. HEWES, *Secretary*.

[SEAL.]

THE MOORE-MANSFIELD CONSTRUCTION COMPANY,
By H. A. MANSFIELD, *President*.

Attest:

DE WITT V. MURRY, *Secretary*.

[SEAL.]

Executed in triplicate.

436 And that by the terms of said last mentioned contract it was mutually agreed among all the parties thereto that said

Electrical Installation Company should do all the work and furnish all the materials for the construction and equipment of the pole line overhead electrical circuit, power house and substation buildings and machinery, repair-shop and rolling stock for a single track and turn-outs electric railway to be built from Indianapolis to Crawfordsville for said Traction Company, and that said The Moore-Mansfield Construction Company should be relieved from the performance of any of the work so undertaken to be performed by said Electrical Installation Company.

That among the provisions of said last mentioned contract was one marked III, as follows:

"The railway company agrees not to hinder the contractor from prosecuting the work uninterruptedly from start to finish, and agrees that that portion of the construction work which is to be done by The Moore-Mansfield Construction Company shall be completed free from any claim of indebtedness, the holders of which may under the laws of the State of Indiana, or of the United States be entitled to a lien of any kind against any of the property of the railway company, so that the railway company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said railway company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana."

Also, a further provision designated XIII, as follows:

"The Moore-Mansfield Construction Company hereby approves all and singular the terms, agreement, provisions and conditions of this contract and the specifications in connection therewith and agrees that it will do all acts necessary to the carrying out of this agreement so far as the same relate to the Moore-Mansfield Construction Company, and it is agreed that the covenants of this agreement shall extend to and bind the successors, assigns and representatives of the railway company and contractor."

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IX.

That the said Moore-Mansfield Construction Company shortly after the execution of said contract of February 21, 1906, to wit: on the 26th day of March, 1906, entered upon the completion of said contract and incurred and paid liabilities which were included and paid in the June estimate and after the execution of said supplemental contract of June 6th, 1906, continued the construction of the work agreed to be performed by it under said contract of February 21, 1906, as modified by said contract of June 6, 1906, and substantially completed the same (except such portion of said original work as was agreed to be performed by said Electrical Installation Co., under said agreement of June 6, 1906), that during the progress of said work estimates were duly made in favor of said cross-complainant sixteen (16) in number, of which estimates Nos. 1 to 8, inclusive and 10 to 12 inclusive were approved and allowed and paid in full; estimate No. 9 was duly made, approved and certified in January, 1907, for work done during the previous month in the sum of \$12,148.47, all of which was paid except the sum of \$675.17, which remained and still remains due and unpaid; estimate No. 13 was

duly made, approved and certified in May, 1907, for work done during the previous month in the sum of \$22,761.01, all of which was paid, except the sum of \$2,964.57, which remained and still remains due and unpaid. Estimate No. 14 was duly made, approved and certified in June, 1907, for work done during the previous month in the sum of \$20,288.18, of which there was paid the sum of \$10,000.00, leaving due and unpaid the sum of \$10,288.18. Estimate No. 15 was duly made, approved and certified in July, 1907, for work done during the previous month in the sum of \$7,602.72, no part of which was paid, and the whole amount still remains due and unpaid. Estimate No. 16 was duly made in August, 1907, for work done during the months of July and August, 1907, for \$7,037.51, which, however, was not approved as to the following items, towit:

Interest	\$1,035.58
Sundry Repairs.....	3,220.59
Percentage thereon.....	532.06
Total.....	\$4,788.53

Upon the hearing it was conceded by The Moore-Mansfield Construction Company, cross-complainant, that said items were properly excluded from said estimate. Leaving the balance approved in the sum of \$2,248.98, which, however, remained unpaid, and the same remains still due and unpaid; so that there remained due and unpaid of said several sums the total amount of \$23,779.62, from which amount, however, should be deducted as credits, the following sums, towit:

1. The amount shown in Schedule "B" of Ex. "B" of this cross-complainant's cross-bill, towit.....	\$1,032.51
2. The order to Guthrie (not paid).....	1,774.43
3. The order to C. Rank (pd.).....	148.46
Total credits.....	\$2,955.46

which said several amounts have ever since and still remain due and unpaid; that the work and labor done and performed and materials furnished by said The Moore-Mansfield Construction Company were accepted by said Traction Company, and the amounts represented in said several estimates less the deductions aforesaid, were the fair and reasonable value of the work and labor done and performed and the materials furnished to and used by the said Moore-Mansfield Construction Company in the construction of said railroad.

That said, The Moore-Mansfield Construction Company, upon the completion of said work so agreed to be performed by it, furnished to the engineer of said Indianapolis, Crawfordsville & Western Traction Company evidence satisfactory to him that the work covered by said contract was free and clear from all liens for labor or materials, and that no claim existed against said property for which any lien

might or could be enforced arising through or under the contract with said, The Moore-Mansfield Construction Company, save and except the lien (if any) in favor of said The Moore-Mansfield Construction Company, hereinafter set forth.

That before filing any suit for the recovery of the balance claimed to be due it from said Indianapolis, Crawfordsville & Western Traction Company, said The Moore-Mansfield Construction Company prepared and signed under its hand and seal to said Traction Company a release and discharge from any and all such claims and demands for and in respect of all matters and things growing out of or connected with said contract or the subject matter thereof, and of and from all claims and demands whatsoever, and then and there tendered and agreed to deliver said release to said Traction Company upon payment by said Traction Company of the balance so
440 due it, and then and there demanded said Traction Company should make such payment, but said Traction Company failed, refused and neglected to pay said sum due said The Moore-Mansfield Construction Company, or any sum, and refused to accept said release unless the same should be delivered to it unconditionally, and notwithstanding its refusal to pay the amount then due and owing by it; and that said The Moore-Mansfield Construction Company refused to deliver said release to said Traction Company unconditionally, but has been ready and willing to deliver the same to said Traction Company, or any other release or discharge required by said Traction Company, at any time, upon the payment of the sum due said The Moore-Mansfield Construction Company.

That for the solicitors of the said cross-complainant, The Moore-Mansfield Company, a reasonable solicitor's fee is three thousand dollars.

X.

That on the 7th day of September, 1907, said defendant (and cross-complainant) The Moore-Mansfield Construction Company executed and filed in the offices of the Recorders of Marion, Hendricks, Boone and Montgomery Counties, its notices of intention to hold a mechanic's lien upon all the railroad property of said defendant Traction Company, a copy of which notice to hold such mechanic's lien is filed with said cross-complainant of said The Moore-Mansfield Construction Company, made a part thereof, and designated as Exhibit "C," the same having been filed with said recorders
441 within sixty days from the completion of its said work and within less than one year from the time of the original filing of the complaint in the Superior Court of Marion County, Indiana, as hereafter set forth, which notices are respectively recorded in the records of the respective recorders of said several counties, as follow:- Marion County miscellaneous record Book 54 at page 249; Boone County, miscellaneous record Book 14 at page 486; Montgomery County, miscellaneous record Book 8 page 11; Hendricks County, miscellaneous record Book 7 at page 519.

XI.

That on the 25th day of August, 1908, said The Moore-Mansfield Construction Company filed its complaint in the Superior Court of Marion County, Indiana, against said defendant Traction Company, and said defendant (and cross-complainant) The Marion Trust Company, Trustee, praying and asking for an enforcement of the mechanic's lien claimed to exist and now sought to be enforced by its cross-bill of complaint in this cause, which action is still pending and ever since has been pending in said Superior Court, being designated as No. 76,707 in Room 4 of said Superior Court; and said cross-complainant, The Moore-Mansfield Construction Company has ever since maintained and insisted upon its right to enforce its said mechanic's lien so claimed to exist upon and against the property of said Indianapolis, Crawfordsville and Western Traction Company, and that its said lien was senior and paramount to the lien in favor of said defendant (and cross-complainant), The Marion Trust Company, Trustee, or the holders of the bonds issued thereunder and secured by said deed of trust.

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XII.

That during the period extending from the 17th day of February 1838 down to and including the 17th day of February 1909, there were from time to time passed by the General Assembly of the State of Indiana, certain Statutes, and during said period there were rendered by the Supreme and Appellate Courts of the State of Indiana certain decisions known and entitled as follows:

a. The Act of February 17, 1838, under the title: "An Act giving to mechanics a lien upon buildings." Revised Statutes of 1838 page 412.

b. The act of February 13, 1843, under the title of: "of the liens of mechanics and others on buildings." Revised Statutes of 1843 page 776, chapter 42, Article 1.

c. The act of June 18, 1852, under the title of: "An Act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the Courts of this State—to abolish distinct forms of action at law and to provide for the administration of justice in a uniform mode of pleading and practice without distinction between law and equity" in which Act under the sub-head "Article XXXVI. To enforce mechanics' liens on buildings," appears Revised Statutes of 1852, Volume 2 page 181.

d. The Act of March 10, 1873, under the title of: "An Act to give security to persons who contract with railroad corporations." Acts of 1873 page 187.

e. The Act of March 6, 1883, under the title of: "An Act concerning liens of mechanics, laborers and material men." Acts of 1883, page 140. Sundry amendments were made to this Act in 1885, 1889, and 1899, but in respects not material to be considered (by stipulation) the title of the original Act remaining undisturbed.

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Under the acts of 1838 and 1843 opinions were handed down by the Supreme Court of the State in the following cases:

McKinney v. Springer et al., 6 Blackford, 511;
 Goble v. Gale et al., 7 Blackford, 218;
 Pifer v. Ward et al., 8 Blackford 252;
 Littlejohn v. Millirons et al., 7 Ind. 125;
 Bishop v. Boyle, 9 Ind. 169;
 Holland et al., v. Jones, 9 Ind. 495;

Under the Act of 1852 opinions were handed down by the Supreme Court in the following cases:

Deming v. Patterson, 10 Ind. 251;
 Wasson v. Beauchamp, 11 Ind. 18;
 Milliken et al., v. Armstrong et al., 17 Ind. 456;
 Hall et al., — Bunte, 20 Ind. 304;
 Beck et al., v. Ensley, 21 Ind. 344;
 Gilman et al., v. Gard, 29 Ind. 291;
 Caldwell et al., v. Asbury, 29 Ind. 451;
 O'Halloran v. Leachey, 39 Ind. 150;
 Kellenberger v. Boyer et al., 37 Ind. 188;
 Capp v. Stewart et al., 38 Ind. 479;
 Sharpe et al., — Clifford et al., 44 Ind. 346;
 Stephenson et ux., v. Ballard et al., 50 Ind. 176;
 Greenup et al., v. Crooks et al., 50 Ind. 410;
 City of Crawfordsville v. Johnson et al., 51 Ind. 398;
 Crawfordsville v. Brundage, 57 Ind. 262;
 Killian et al., v. Eigemann, 57 Ind. 480;
 Schneider v. Kolthoff et al., 59 Ind. 568;
 Princeton v. Gebhart, 61 Ind. 187;
 Harrington v. Dollman, 64 Ind. 255;
 Irwin et al., v. The City of Crawfordsville, 58 Ind. 492;
 Woolen et al., v. Wishmier, 70 Ind. 108;
 Vail et ux., v. Meyer, 71 Ind. 159;
 Hamilton v. Naylor et al., 72 Ind. 171;
 Nurdyke etc. Co. v. Dickson et al., 76 Ind. 188;
 Mark v. Murphy et al., 76 Ind. 534;
 Stephenson et ux., v. Ballard et al., 82 Ind. 87;
 Thompson v. Shepard, 85 Ind. 352;

Under the Acts of 1873 or 1883 aforesaid, opinions were handed down either by the Supreme Court or the Appellate Court of Indiana, as shown by the respective citations of Volume of Reports, as follows:

444 Gortemiller v. Rosengard et al., 103 Ind. 414;
 Alvey v. Reed, Guardian, 115 Ind. 148;
 Adams v. Buhler et al., 116 Ind. 100;
 Midland etc. Co. v. Wilcox et al., 122 Ind. 84;
 Goodbub v. The Estate of Hornung, 127 Ind. 181;
 McNamee v. Rauch et al., 128 Ind. 59;
 McElwaine et al., v. Hosey et al., 135 Ind. 489;
 Jeffersonville, etc. Co. v. Ritter et al., 138 Ind. 170;

Jenckes v. Jenckes et al., 145 Ind 624;
 Totten, etc. Co. v. Muncie Nail Co. et al., 148 Ind 372;
 Union etc. Assn. v. Holberg et al., 152 Ind. 139;
 Bird et al., v. St. John's, etc. Church, 154 Ind. 138;
 Duckwell et al., v. Jones, 156 Ind. 682;
 Sulzer Machinery Co. v. Rushville Water Co., 160 Ind. 202;
 Lenglesen v. McGregor et al., 162 Ind. 258;
 Adamson v. Saner et al., 3 Ind. App. 448;
 Kulp et al., — Chamberlain et al., 4 Ind. App. 550;
 Brigham v. Dewald et al., 7 Ind. App. 115;
 Vorhees et al., v. Beckwell, 10 Ind. App. 224;
 Alexandria Bldg. Co. v. McHugh, 12 Ind. App. 282;
 Reichart v. Krass etc., 13 Ind App. 348;
 Bratton v. Ralph et al., 14 Ind. App. 153;
 Conlee et al., v. Clark et al., 14 Ind. App. 205;
 Davis etc. Co. v. Vice et al., 15 Ind. App. 117;
 Rhodes et al., v. Webb, etc., et al., 19 Ind. App. 195;
 Patton v. Matter, Trustee, et al., 21 Ind. App. 277;
 Montpelier, etc. Co. et al., v. Stephenson et al., 22 Ind. App. 175;
 Taggart v. Kem et al., 22 Ind. App. 271;
 McFarlane et al., v. Foley et al., 32 Ind. App. 510;
 Geo. B. Swift Co. et al., v. Dollie, Receiver, 39 Ind. App. 753;
 Whitcomb v. Roll, 40 Ind. App. 119;
 Stephens et al., v. Duffy, 41 Ind. App. 385;
 Beach et al v. Huntsman, 42 Ind. App. 205;

The Supreme Court of Indiana and the Appellate Court of Indiana, respectively, handed down opinions in which were considered and passed upon certain provisions of the above mentioned Acts of 1873 and 1883, respectively, in the following cases, namely:

Colter v. Frese, 45 Ind. 96;
 Smith v. Newhaus, 144 Ind. 96;
 Geo. B. Swift Co. v. Dollie, 39 Ind. App. 653;
 McHenry v. Nickbacker, 128 Ind. 77;
 Closson v. Billman, 161 Ind. 610;
 Miller v. Taggart, 35 Ind. App. 595;

445 The above and foregoing lists of cases contain every case, and all the cases decided by the Supreme and Appellate Courts of Indiana, wherein the matter or question of any right asserted or claimed by a contractor or sub-contractor under any statute of the State of Indiana, respecting the liens of mechanics and material men was passed upon by either of said Courts prior to February 18, 1909.

XIII.

On said 18th day of February, 1909, the Supreme Court of Indiana rendered a decision in the case entitled Indiana Northern Traction Company et al. v. Brennan, and reported in 174 Indiana 1, and thereafter overruled a petition for rehearing in said case, and

said Supreme Court has not since overruled or modified its decision in said cause of Indianapolis Northern Traction Company v. Brennan, but has explicitly followed said decision in several cases since decided by said Supreme Court.

All of the Court decisions and Indiana Statutes above mentioned are by reference made parts of this report, and by stipulation of parties the same are to be deemed, before the Court and have the same force and effect as though copied in this report.

At the time the cross-complainant, The Moore-Mansfield Construction Company made the contracts hereinbefore mentioned and afterwards performed such contracts and under the same furnished materials and performed work and labor, as it did do, in the construction of said Traction road, it was its information and belief that contractors and subcontractors under the laws of Indiana were entitled to take, hold and enforce mechanic's liens for the value

446 of such work, labor and materials furnished and used in the erection and construction of railroads in the State of Indiana, and that it contracted to furnish the materials and perform the labor, and it did furnish the materials and perform the labor required on said Traction Road, and did permit the said Traction Company to become indebted to it for the value of the materials furnished and work and labor done and performed with the belief based upon the information which it had had for years that as such contractor it was accorded the right to hold and enforce a mechanic's lien therefor, and that but for that knowledge and information it would not have so contracted or furnished the materials or performed the labor which it agreed to do.

XIV.

That on or about the 14th day of April, 1906, said defendant (and cross-complainant) William A. Guthrie entered into a contract with said The Moore-Mansfield Construction Company for the sale and delivery to said Moore-Mansfield Construction Company for use in the construction of said railroad for said Indianapolis, Crawfordsville & Western Traction Company, of certain ties therein mentioned and described, which contract was on the 24th day of April, 1906, approved by the Executive Committee of said Traction Company in accordance with the provisions of said Traction Company's contracts with said The Moore-Mansfield Construction Company hereinbefore referred to, a copy of which contract with said Wil-

447 liam A. Guthrie is filed with and made part of the cross-complaint of said William A. Guthrie heretofore filed in this cause and marked Exhibit "C," and is by reference made part hereof, and that on April 28th, 1906, said last named contract was supplemented by a certain agreement in writing concerning the acceptance of ties in chestnut timber executed by said The Moore-Mansfield Construction Company, and accepted by said William A. Guthrie, a copy of which is attached to and made a part of the cross-complaint of said William A. Guthrie herein filed and marked Exhibit "D," and is made part hereof by reference.

That subsequently, said William A. Guthrie furnished through said The Moore-Mansfield Construction Company to said Traction Company, in addition to the ties contracted for in said contracts "C" and "D," the total number of 5,650 ties, all of which were received along the line of said Traction Road, and were furnished to said Traction Company through said The Moore-Mansfield Construction Company for use in and were used in the construction of said defendant Indianapolis, Crawfordsville & Western Traction Company's said railroad, and said The Moore-Mansfield Construction Company thereupon prepared and delivered to said Indianapolis, Crawfordsville & Western Traction Company a certain instrument or order for the payment of the balance due on account of ties furnished by said William A. Guthrie, in manner as aforesaid, a copy of which is filed with, attached to and made part of said William A. Guthrie's said cross-complaint and marked Exhibit "E," and made part hereof by reference.

That there was paid to said Guthrie for ties so furnished and used, the full purchase price therefor, except said balance of 448 \$1,853.20, which was due and unpaid from and after the 10th day of June, 1907, and which is still due and unpaid with interest from said last mentioned date, the same having been reduced to judgment, as hereinafter set forth; and that though often requested to do so said defendant Indianapolis, Crawfordsville & Western Traction Company has refused and neglected to pay said claim, but accepted and approved said order of said The Moore-Mansfield Construction Company therefor, and from time to time promised to pay said balance, and thereafter, as is set out in Paragraph XVII of this Report, said Guthrie recovered judgment against said Traction Company for said balance, so as aforesaid due him on and after June 10th, 1907.

XV.

That at the time said mortgage or deed of trust was executed by said Indianapolis, Crawfordsville & Western Traction Company to said The Marion Trust Company, trustee, as aforesaid, to wit: on the 21st day of May, 1906, said Traction Company's railroad was not so far completed as to enable it to perform the public services for which it was incorporated; that the ties furnished by said Guthrie were so furnished several months subsequent to the date upon which said mortgage or deed of trust was executed, and when said railroad was still incomplete and still unable to perform its duties to the public as a public service corporation; that said ties were necessary to the completion of said railroad, and that the value 449 of said railroad property as it existed immediately before said ties were furnished was enhanced by the use and incorporation of said ties therein to the full amount of the purchase price of said ties.

XVI.

That said Indianapolis, Crawfordsville & Western Traction Company since the time it became indebted to said cross-complainant

Guthrie for said cross-ties so furnished has paid as interest upon the then outstanding bonds, issued and sold pursuant to said mortgage or deed of trust, sums in excess of said Guthrie's claim herein sued upon.

That a large number of the holders and owners of said outstanding bonds, towit: three-fourths thereof, were at the time said ties were delivered by said Guthrie, and said interest was paid, and now are stockholders in amounts equal to their respective holdings of bonds in said Indianapolis, Crawfordsville & Western Traction Company, and that at the time said bondholders purchased said bonds they received capital stock of said Traction Company in amounts substantially equal to the par value of the bonds so purchased.

That the officers and directors of said Traction Company and the various committees of said Traction Company, both at the time said ties were furnished as aforesaid and at the present time, were and are holders of a portion of said outstanding bonds so issued and sold, and during all of said time said Guthrie was also a stockholder and bondholder of said Traction Company.

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XVII.

That on the 3rd day of January, 1908, said defendant, (and cross-complainant) William A. Guthrie filed in the Marion Superior Court of Marion County, Indiana, his complaint against said Indianapolis, Crawfordsville & Western Traction Company and said Moore-Mansfield Construction Company, asking judgment against said defendants for said balance due for said cross ties furnished and used in the construction of said railroad, which cause was afterward transferred upon a change of venue to the Hancock Circuit Court in Hancock County, Indiana, wherein judgment was duly rendered by said Hancock Circuit Court in favor of said Guthrie and against said defendant Traction Company for the sum of \$2065.08, on the 20th day of October, 1909.

That thereupon a transcript of said judgment duly certified by the Clerk of said Hancock Circuit Court was filed by said Guthrie in the offices of the Clerks of Montgomery, Hendricks and Marion Counties, respectively, on the following dates, and were recorded in the following records, towit:

February 22^m 1910, Judgment Docket 19, page 222 and Order Book 78, page 73, in the office of the Clerk of Montgomery County; February 22, 1910, In Transcript Order Book 44, page 293, in the office of the Clerk of Hendricks County; February 5, 1910, in Transcript Order Book 177, page 549, in the records of the clerk of Marion County; on February 22nd, 1910, in Miscellaneous Order Book 5, page 266, in the records of the Recorder of Boone County; all in the state of Indiana; a copy of said transcript being filed with and made a part of the cross bill of complaint of said Guthrie heretofore filed in this cause, marked Exhibit "A."

That said judgment is wholly unpaid and unsatisfied and there is due said cross-complainant thereon said sum of \$2065.08 with interest from October 20th, 1909, together with costs thereon.

That said cross-complainant Guthrie prosecuted his said action in which said judgment was so rendered with due diligence.

XVIII.

That after said mortgage or deed of trust was executed by said Indianapolis, Crawfordsville & Western Traction Company, to said Marion Trust Company, Trustee, towit: on or about the 18th day of August, 1906, said mortgagor acquired by purchase certain lands in Montgomery County, Indiana, upon which to construct a power house and equipment to be used in connection with its said line of railroad, and that said power house has since been erected thereon and said lands are now used in connection with, and are necessarily appurtenant to said line of railroad for the purposes aforesaid; which lands are described as follows, towit:

"Part of the east half of the northeast quarter of section thirty-one (31) Township Nineteen (19) North of Range Four (4) West, bounded as follows:

Beginning at an iron pin in the center of the Crawfordsville and Lafayette Pike, two chains sixteen and one-half links distance in a northerly direction from the Sperry Mill and running thence south 83 degrees east, eighty-one (81) feet; thence north 69 degrees east one hundred and one (101) feet; thence north $58\frac{1}{2}$ degrees, east, one hundred sixty (160) feet; thence north $44\frac{1}{2}$ degrees east sixty-six (66) feet; thence south 85 degrees and 5 minutes east 452 eighty-two and one-half ($82\frac{1}{2}$) feet; thence south 23 degrees east twenty (20) rods eight and two-thirds ($8\frac{2}{3}$) feet; thence south eleven and one-half degrees west thirty-seven (37) rods and fourteen and one-half ($15\frac{1}{2}$) feet to Sugar Creek; thence down said stream with the meanderings thereof about forty-five (45) rods to the center of the Crawfordsville and LaFayette Pike; thence north 35 degrees east three *three* hundred and Eighty five (385) feet to the place of beginning and containing twelve and thirty hundredths ($12\frac{30}{100}$) acres, more or less.

Also the undivided one-half ($\frac{1}{2}$) of Part of the West half of the Southwest quarter of section twenty-nine (29) Township Nineteen (19) North, Range four (4) West, bounded as follows:—Beginning at a point four and one-half ($4\frac{1}{2}$) rods west of the South East corner of the West half of the Southwest quarter of said section twenty-nine (29) and running thence north 28 degrees and 40 minutes West Sixteen (16) rods; thence north 8 degrees and 20 minutes West Twenty-six (26) rods and ten (10) links; thence North Fourteen (14) rods; thence West Twenty one and one half ($21\frac{1}{2}$) rods; thence South 24 degrees and 20 minutes West thirteen (13) rods and Nine (9) links; thence south ten degrees and 30 minutes East fifteen (15) rods; thence south 42 degrees and 40 minutes East twenty (20) rods and six (6) links; thence east twenty four (24) rods to the place of beginning containing nine and sixty-seven hundredths ($9\frac{67}{100}$) acres more or less.

Thence South 10 Degrees West twelve and one-half ($12\frac{1}{2}$) rods;

Also the undivided one-half ($\frac{1}{2}$) of part of the West half of the

northwest quarter Section thirty-two (32) Township nineteen (19) North, Range Four (4) West, bounded as follows:—Beginning at a point four and one-half ($4\frac{1}{2}$) rods West of the Northeast corner of the West half of the Northwest quarter of said Section thirty-two (32) and running thence South 18 degrees east twenty rods; thence south 9 degrees and 45 minutes West twenty-four (24) rods; thence North 33 degrees and 45 minutes West, Forty-seven (47) rods; thence East twenty-four (24) rods to the place of beginning, containing three and twenty-three hundredths ($3\frac{23}{100}$) acres, more or less;

Also the right of ingress and egress to and from said land along the line of the Chicago, Indianapolis and Louisville Railway, formerly the Louisville, New Albany and Chicago Railroad.

All the undivided one-half ($\frac{1}{2}$) of all grounds occupied by the Mill dam across Sugar Creek situated in the West half of the North west quarter of said Section thirty-two (32) Township Nineteen (19) North of Range Four (4) West;

Also the undivided one half ($\frac{1}{2}$) of all the *of all the* ground occupied by the mill pond situated partly on the last mentioned tract of land *of land* and on part of the South West quarter 453 of said Section thirty-two (32) and on part of the West half of the South east quarter of Section twenty-nine (29) and part of the West half of the South East Quarter of Section twenty (20) also in Township Nineteen (19) North of Range four (4) West;

Also the undivided one half ($\frac{1}{2}$) of the land and privileges of the waters of said Sugar Creek purchased by Isaac G. Elston of Abraham Horner as specified in a deed executed by said Horner and others to the said Elston on the fourth day of November, 1840, and recorded in Deed Record 9 pages 158 and 159 in the Recorder's Office of Montgomery County, Indiana, and also the undivided one half ($\frac{1}{2}$) of the water privileges purchased of the Messrs. Stover by said Elston as specified in said deed executed by them to said Elston on the 19th day of April, 1842, and recorded in Deed Record 10, page- 153 and 154, in the Recorder's Office of said County: Also the land occupied by the millrace connecting said mill pond with the flouring mill situate on said lands, said race passing through part of the East half of the North east quarter of Section thirty-one (31) and through part of the West half of the North west quarter of section thirty-two (32) Township and range aforesaid, all situate in the County of Montgomery and State of Indiana.

Also the ground necessary to widen said race so as to use the water in the most advantageous manner for driving machinery."

Also the following described real estate in Montgomery County, Indiana:

"Beginning at the Southeast corner of a four acre tract of land owned by John T. and Mary T. Shephard and running in a North-easterly direction for a distance of three hundred eighteen (318) feet, more or less to the North line of said tract; thence West for a distance of twenty-five and three tenths ($25\frac{3}{10}$) feet; thence in a southwesterly direction twenty-five (25) feet from and parallel to

the East line of said tract for a distance of three hundred eighteen (318) feet, more or less, *more or less* to the South line (or Covington Street) of said four acre tract of land; thence East twenty-five and three-tenths ($25 \frac{3}{10}$) feet along said South line to the place of beginning, the same being a strip of ground twenty-five (25) feet wide off the East end of a four acre tract of land mentioned in Deed No. 1735, recorded in Deed Book 97, at Page 603, dated June 23, 1906."

454 Also the following described real estate in Montgomery County, Indiana:

"Part of the East half of the North east quarter of Section Thirty-one (31) in Township 19, North, Range 4 West and bounded as follows, Beginning at a stone 625 feet west of the South-east corner of said quarter section and running thence North 2 degrees and 45 minutes East 552½ feet; thence North 11 degrees and 15 minutes East 430 feet; thence North 42 degrees and 45 minutes West 360 feet; thence South 31½ degrees West 460 feet; thence South 20½ degrees West 96 feet; thence South 9 degrees and 25 minutes West 895 feet; thence North 87 degrees East 551 feet, to the place of beginning containing 12½ acres, more or less.

Excepting from the above description the following, Beginning at the aforesaid starting point and running thence North 2 degrees and 45 minutes East, 4 chains and 82 links; thence West Parallel with the South line of said tract to the west line; thence South 9 degrees and 25 minutes West, 4 chains and 82½ links to the South west corner of said tract of land; thence North 87 degrees East 551 feet to the beginning point, which exception contains 4 acres, more or less, and the tract conveyed Containing 8½ acres, more or less."

That each and all of said lands so acquired and owned by said Indianapolis, Crawfordsville & Western Traction Company now form an integral part and portion of the railroad of said defendant, Indianapolis, Crawfordsville & Western Traction Company, and are necessarily used in connection therewith, and are necessary to the future successful operation thereof.

That all rights of way, franchises, equipment, rolling stock, tools, implements, and property of every kind and description now owned by said defendant Indianapolis, Crawfordsville & Western Traction Company, whether owned at the time said mortgage or deed of trust to said The Marion Trust Company, Trustee, was executed or since acquired, are now used by the receiver of said Traction Company heretofore appointed by this Court in the operation of said railroad and are necessary thereto and constitute a part thereof.

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XIX.

That all moneys and benefits derived from the sale of said fifteen hundred bonds of the par value of One Million Five Hundred Thousand Dollars (\$1,500,000), all of which were duly executed, issued and sold by said Indianapolis, Crawfordsville & Western Traction Company and duly certified by said Trustee, were used and expended

in the construction and equipment of said railroad and the purchase from said Consolidated Traction Company of the property acquired from it, hereafter referred to and now forming a part of the railroad so owned by said Indianapolis, Crawfordsville & Western Traction Company and in the custody and possession of this Court through its receiver heretofore appointed in this cause.

XX.

That each of said bonds so issued pursuant to said mortgage or deed of trust is dated March 1st, 1906, and is by its terms made payable July 1st, 1936, in the gold coin of the United States of America of the then present standard of weight and fineness, at the office of the Van Norden Trust Company in the City of New York, with five per cent (5%) interest from date per annum, in like gold coin, payable on the 1st days of January and July in each year upon the presentation of the proper coupons at the time and place mentioned, said bonds being payable to bearer, or if registered then to the registered holders thereof.

That among the provisions of said mortgage or deed of trust is one described therein as "Section 1 of Article 6," of the following tenor, to-wit:

456 "SECTION 1, Article 6. Whenever any default shall be made by the Traction Company in the payment of any interest moneys secured hereby and such default shall continue for six months, the Trustee shall, upon request of the holders of a majority of the bonds then outstanding, declare the whole principal sum secured by the said bonds to be due and payable, anything to the contrary herein contained notwithstanding."

And that among the conditions of said outstanding bonds and each of them is one of the following tenor, to-wit:

"But if the promisor shall make any default for six months in the payment of any interest hereon or on any bond of this issue, the principal sum hereby secured shall become due and payable at any time thereafter, while the interest remains in default, at the election of a majority in interest of holders of the bonds secured by the indenture hereinafter mentioned and at the time outstanding."

XXI.

That default having been made in the payment of interest as hereinbefore set forth, the owners and holders of a majority of the outstanding bonds secured by said mortgage did on the 15th day of January, 1910, pursuant to the provisions of said mortgage or deed of trust and the bonds secured thereby, request said The Marion Trust Company as Trustee in writing to declare the whole principal sum secured by said outstanding bonds and by said mortgage or deed of trust to be due and payable; and that immediately upon receiving said request said The Marion Trust Company as Trustee, in compliance therewith and pursuant to the provisions of said mortgage or deed of trust and bonds secured thereby, did declare said

entire issue of outstanding bonds to be due and payable and notified said defendant Indianapolis, Crawfordsville & Western Traction

457 Company in writing of such action and demanded immediate payment of said entire indebtedness evidenced by said bonds and secured by said deed of trust together with interest thereon; said notice and demand being served upon the President and Secretary of said defendant Indianapolis, Crawfordsville & Western Traction Company by delivering to each of them a duplicate thereon in the words and figures following, to wit:

"INDIANAPOLIS, INDIANA, *January 24, 1910.*

Indianapolis, Crawfordsville & Western Traction Company:

You are hereby notified that the holders of a majority of the bonds secured by the mortgage or deed of trust executed by your Company on the 21st day of May, 1906, to this Company, as Trustee, have requested us in writing to declare the whole principal sum represented and secured by said bonds and mortgage to be, and become immediately due and payable because of the default of your Company in the payment of interest moneys secured by said mortgage, which default has occurred and continued for a period of more than six months before said request was so made.

You are, therefore, hereby further notified that pursuant to said request, and in compliance with the terms of said mortgage or deed of trust, and especially in compliance with the provisions of Section 1 of Article VI thereof, the entire principal sum represented and secured by said bonds and mortgage or deed of trust now outstanding, has been, and is hereby declared to be due and payable, and demand is hereby made for the payment of said entire sum including all accrued interest.

458 Unless said entire sum is promptly paid we shall be required, in further compliance with the request of a majority of said bondholders to take proper action to foreclose said mortgage and collect the entire sum of money secured thereby.

THE MARION TRUST COMPANY,
(Signed) By HUGH DOUGHERTY, *President.*"

Which notices were so delivered to and received by said officers of said Traction Company on the 27th day of January, 1910, before the cross-bill of complaint of said The Marion Trust Company, Trustee, was filed in this cause.

That the directors of the Indianapolis, Crawfordsville and Western Traction Company at the time H. J. Milligan was appointed Receiver by said United States Circuit Court in this cause, and at the time the Marion Trust Company, Trustee, filed its cross-bill for the foreclosure of the said mortgage, were as follows:

Messrs. Edward Hawkins, A. E. Reynolds, C. N. Van Cleave, A. M. Glossbrenner, A. A. Barnes, George P. Haywood, A. M. Hewes, B. F. Crabb, Sterling R. Holt, A. A. Schwartz, Ezra C. Voris and P. C. Summerville.

That the said A. M. Hewes, one of the above directors of said

Indianapolis, Crawfordsville and Western Traction Company is also the secretary and treasurer of the Electrical Installation Company, the original complainant in this cause.

That A. C. Reynolds, one of the directors of the said Indianapolis, Crawfordsville and Western Traction Company at the time
459 said cross-bill by the Marion Trust Company, Trustee, was filed, was also one of the four of the re-organization committee which petitioned the Marion Trust Company to mature the bonds and foreclose the said mortgage, pursuant to which said notice last aforesaid was given; that said Reynolds at that time was the owner of forty five (45) of said mortgage bonds.

That said director C. N. Van Cleave was the owner of thirty-nine (39) of said bonds.

That said director Ezra C. Voris was the owner of sixty five (65) of said bonds, and

That said director P. C. Summerville, was the owner of sixty-seven (67) of said bonds, making two hundred sixteen (216) of said bonds owned by the said directors at that time and which were deposited with the Marion Trust Company, pursuant to the re-organization agreement signed by said directors.

That at the time of said notice by said reorganization committee to the Marion Trust Company, that there were but 887 bonds deposited under said reorganization agreement. That without the two hundred sixteen (216) bonds deposited by and the signature of said mentioned directors of said Indianapolis, Crawfordsville and Western Traction Company, there would not have been a majority of said bondholders signing said reorganization agreement, the signers of which agreement were the only holders of bonds who requested the Marion Trust Company, Trustee, to declare the principal of the bonds due as aforesaid.

William A. Guthrie was one of the subscribers of the Underwriters' Agreement, and received thereunder \$10,000.00 par value of said bonds and an equal amount of said stock and con-
460 tinued to hold the same down to this time.

Said Guthrie became a signer of the above mentioned Reorganization Agreement on November 30th, 1910, but without prejudice to his claims on account of cross-ties sold and furnished as hereinbefore stated.

XXII.

That on and prior to the 6th day of October, 1905, the defendant Consolidated Traction Company, which is a corporation organized and existing under the laws of the State of Indiana, had acquired and was then the owner of certain contracts, franchises and privileges with and derived from the Indianapolis Traction & Terminal Company of the City of Indianapolis, Indiana, the towns of Brownsburg, Lizton, Jamestown and New Ross and the cities of Indianapolis and Crawfordsville, Indiana, and other towns in said State, and had surveyed and established a line of railroad from said City of Indianapolis through said Towns of Brownsburg, Lizton, Jamestown and New Ross, and said City of Crawfordsville, and had procured a

private right of way by purchase in fee simple fifty feet wide, more or less, from said City of Indianapolis to said City of Crawfordsville, and between and connecting said Towns of Brownsburg, Lizton, Jamestown, New Ross and the City of Crawfordsville, and had constructed the grade for its tracks for nearly the entire distance from said City of Indianapolis to said City of Crawfordsville, and had made other surveys and established other lines for its said railroad from said City of Crawfordsville west toward its proposed terminus at the Indiana-Illinois state line, and had procured reports, prospectuses, maps and blue prints for its said line, together with
461 complete grading and specifications for the construction of its proposed line from said City of Indianapolis to said City of Crawfordsville, including the construction of a power house and substations, and had acquired other properties, rights and privileges pertaining to the construction, equipment and operation of its said railroad.

And thereupon on said 6th day of October, 1905, said defendant Consolidated Traction Company entered into an agreement in writing with said Indianapolis, Crawfordsville & Western Traction Company, a copy of which agreement is filed with and made part of the cross-bill of complaint heretofore filed in this cause by said The Marion Trust Company, Trustee, and marked "Exhibit C," whereby said Consolidated Traction Company for value received sold, transferred and delivered to said defendant Indianapolis, Crawfordsville & Western Traction Company "all and singular the rights, privileges, contracts, franchises, real estate, rights of way, road-bed, writings, prospectuses, reports, drawings, specifications, owned and possessed by said Consolidated Traction Company, free from debt and incumbrances except moneys in hand due or owing, personal property, and capital stock and stock subscriptions," and agreed to execute all necessary deeds of conveyance and instruments of assignment necessary to vest the absolute title to said property, legal and equitable, in said defendant The Indianapolis, Crawfordsville & Western Traction Company.

That said defendant Indianapolis, Crawfordsville & Western Traction Company paid the full purchase price agreed to be paid for said property, and thereupon immediately after so making said contract of October 6, 1905, entered upon and took possession of
462 all of the property, rights, privileges and franchises so acquired by the terms of said contract, and with the full knowledge, approval and consent of said Consolidated Traction Company and constructed and completed its line of railroad thereon from a point in the City of Indianapolis in the center of Michigan Street thence north and west to the city limits of said City of Indianapolis and thence to and into the City of Crawfordsville.

That said Consolidated Traction Company has no interest and claims no interest in the property so sold, transferred and delivered to said defendant, Indianapolis, Crawfordsville and Western Traction Company; but that no deed of conveyance or other instrument of title aside from said contract of October 6th, 1905, was ever executed.

That the defendant and cross-complainant, William A. Guthrie did not know until after he had obtained said judgment against said Indianapolis, Crawfordsville & Western Traction Company that said agreement between the Consolidated Traction Company and the Indianapolis, Crawfordsville & Western Traction Company hereinbefore mentioned had been executed, or was ever in existence.

XXIII.

That the defendant Indianapolis, Crawfordsville & Western Traction Company had so far completed the construction and equipment of said interurban railway from and into the City of Indianapolis, Marion County, State of Indiana, to and into the City of Crawfordsville, Montgomery County, State of Indiana, as to enable it to, and it did then, commence the regular operation of cars and trains on said interurban railway on a regular schedule on the 7th day of July, 1907; and, thereafter continuously operated said railroad and run cars thereon daily for the carriage of passengers and freight until the appointment of Harry J. Milligan, Receiver in this cause on the 8th day of July, 1909; that said Receiver since the date of his appointment has continuously thus operated said road until this time, and is now operating the same.

XXIV.

That among the provisions of said mortgage or deed of trust to said The Marion Trust Company, Trustee, is one designated as Clause E, section 2, Article V, which reads as follows, to-wit:

"That during the continuance of this security it will keep such of the property as is hereby conveyed as may be liable to injury or destruction by fire reasonably insured, and the policies therefor shall be payable to the Trustee in case of loss, and be deposited with the Trustee, and all insurance moneys received by the Trustee from such policies shall be applied to the replacement, restoration or repair of such property as may have been injured or destroyed, or to the purchase of other property needed for the maintenance or operation of the said system of railroads or other operations and business of the Traction Company, and such replaced or restored property shall immediately become subject to the lien of this mortgage. All insurance moneys so received by the Trustee shall be paid out by it on the written order of the Treasurer of the Traction Company after receiving satisfactory proofs or assurances, either in the form of a resolution of the Board of Directors of the Traction Company, or otherwise, as to the fair value of such repairs, replacements or additional property, and the desirability of making or requiring the same; and in case such moneys shall not be applied as above provided, they shall be held by the Trustee in the same manner and upon the same trusts as hereinbefore provided in case of purchase moneys received by the Trustee from the sale of equipment, furniture, machinery or other property. In case of the neglect or refusal of the Traction Company its successors or assigns, thus to insure or to pay any such taxes, rates, levies, charges, or assessments,

the Trustee, or any bondholder, may procure and pay for such insurance, and pay such taxes, rates, levies, charges or assessments, or purchase any outstanding certificates of sale thereunder, and all the moneys so paid with interest thereon at six per cent annum, shall become a lien upon the property hereby conveyed prior to the lien of the bonds, and the Traction Company covenants that it will pay to the Trustee or any bondholder any moneys paid by it or him, in accordance with the foregoing, with interest at the rate of six per cent per annum."

Also, the following provision designated as Clause G, Section I, Article V:

"(g) That the Traction Company will pay to the Trustee all expenses incurred by the Trustee in the execution of the trusts hereof, and all sums of money, if any, that shall have been paid by the Trustee or any persons interested in the trusts hereof on account of any such taxes, charges, assessments or liens or insurance moneys in case of any default in respect thereof on the part of the Traction Company, as aforesaid, with interest at the rate of six per cent per annum from the time or times of such payments, respectively."

Also, Clause One, Section V, of Article VI, as follows:

"5. The proceeds arising from any such sale shall be applied by the Trustee as follows: First: To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys and counsel, and all expense, liabilities and advances made and incurred by the Trustee hereunder, and all payments made by it, or by any other interested person on account of taxes, assessments, insurance premiums and other charges in respect of the mortgaged premises, and all other sums payable to the Trustee hereunder."

That on or about the 10th day of September, 1907, said Indianapolis, Crawfordsville & Western Traction Company, defendant, neglected and failed to take out any policies of insurance upon the property of said Traction Company, and the Trustee under said mortgage did not take out and procure any fire insurance to be written upon the property of said Traction Company which was wholly without fire insurance.

That thereupon Charles N. VanCleave and Sterling R. Holt being owners of a large amount of said first mortgage bonds of said Traction Company requested the Security Trust Company, intervening petitioner herein, to write policies of insurance upon the property of said defendant Traction Company; said Security Trust Company being then and there the holder as collateral security of eight (8) bonds belonging to said VanCleave, but deposited with said Security Trust Company to secure certain indebtedness then owing by said VanCleave to said Security Trust Company; and said Security Trust Company knew of the existence of the respective clauses of said mortgage or deed of trust to said The Marlon Trust Company, trustee, quoted in this paragraph, and being interested in the protection of said collateral security so held, thereupon, from time to time thereafter, procured insurance to be written upon the property of said Indianapolis, Crawfordsville & Western Traction

Company and said premiums thereon to the amount of Thirty-one hundred and sixty-five dollars.

That said Indianapolis, Crawfordsville & Western Traction Company afterwards reimbursed said Security Trust Company for said premiums so advanced and paid by it in the sum of One thousand dollars (\$1,000).

That save and except said sum of One thousand dollars said Security Trust Company has never been repaid or reimbursed for the moneys so advanced by it in payment of said insurance policies; and that the amount so paid out by said Security Trust Company in procuring said policies of insurance less said sum of one thousand dollars so received by it in partial reimbursement for said outlay amounts, with interest from the respective dates upon which said advancements were made to the date of this report is the sum
466 of thirty-seven hundred twenty-one and 64/100 dollars to April 1st, 1911.

XXV.

The firm of Smith & Duckworth between the 27th day of January, 1908, and the 3rd day of May, 1909, sold and delivered to the Indianapolis, Crawfordsville & Western Traction Company lumber and coal aggregating in value \$104.70; the lumber was sold between January 27th, 1908, and February 27th, 1909, and the amount of said lumber so sold was \$36.55; the coal was sold between the 11th day of March, 1909, and the 3rd day May, 1909, and amounted to \$68.15; of said total sum of \$104.70, materials were furnished and delivered between January 22, 1909, and May 3rd, 1909, amounting to \$83.22; the lumber so sold was used in the construction and repair of certain cars of said Traction Company which had theretofore been damaged in wrecks, and the coal so sold was used by said Traction Company in heating its cars and stations.

Respectfully submitted,

EDWARD DANIELS,
Master in Ch'y.

Indianapolis, Ind., April 12", 1911.

And afterwards, to-wit, at the November Term, 1911, of the District Court of the United States for the District of Indiana, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

467

Decree.

And now this 26th day of January, 1912, said cause comes on to be heard upon the original bill of complaint as amended, and the answer thereto, and upon said respective cross bills and amended cross bills of complaint and the answers thereto, respectively, and upon the exhibits filed with said bills and cross bills, respectively, and upon the report of the Master, and upon the issues of law raised by said bill and said respective cross bills and amended cross bills and answers thereto; and being submitted to the Court upon final

hearing and after argument by counsel and the Court being well advised in the premises.

And it appearing to the Court that Honorable Edward Daniels, Master herein, duly filed his report of the facts in said cause upon the issues of fact raised by said original bill and cross bills as amended on the 12th day of April, 1911, and that the same has not been excepted to, and that the time for excepting thereto has expired, it is therefore ordered, adjudged and decreed that said report be and the same is hereby approved and confirmed.

It is now further ordered, adjudged and decreed, That all and singular the material allegations contained in the original bill of said complainant as amended, and all and singular the material allegations contained in the cross bill of said cross-complainant, The Marion Trust Company, Trustee, as amended, are true, except as hereinafter otherwise found and decreed.

It is hereby further ordered, adjudged and decreed:

First. That on the 21st day of May, 1906, being theretofore duly authorized by law, the defendant (and cross-complainant),
468 Indianapolis, Crawfordsville & Western Traction Company, a corporation existing under the laws of the State of Indiana, duly executed and delivered to said defendant (and cross complainant) The Marion Trust Company, a corporation duly organized under the laws of the State of Indiana, as Trustee, all as alleged in the cross bill of said The Marion Trust Company, Trustee, its valid and subsisting mortgage or deed of trust to secure certain bonds of said Company to be issued by it as in said mortgage provided:

That thereafter pursuant to said mortgage or deed of trust said Indianapolis, Crawfordsville & Western Traction Company duly and legally issued, negotiated and sold to divers persons for value Fifteen Hundred (1500) of said bonds of the par value of One Thousand Dollars (\$1,000.00) each, and of the aggregate par value of One Million Five Hundred Thousand Dollars (\$1,500,000.00), said bonds being numbered one to fifteen hundred, both inclusive, with interest coupons attached, all as shown by said cross bill of said The Marion Trust Company, Trustee, and Exhibits thereto attached; and that said mortgage was duly recorded in the Recorder's offices in each and every county in the State of Indiana wherein any part of the property covered thereby was located within ten days after the execution thereof, to wit: in Marion County, Indiana, May 24, 1906, in Mortgage Record 476 at page 551; in Hendricks County, Indiana, May 25, 1906, in Mortgage record 48 at page 350; in Boone County, Indiana, May 25, 1906, in Mortgage record 59 at page 421; in Vermillion County, Indiana, May 25, 1906, in Mortgage record 22; in Warren County, Indiana, on May 26, 1906, in Mortgage
469 Record 27 at page 194; in Fountain County, Indiana, May 25, 1906, in Mortgage record 21; and in Montgomery County, Indiana, May 26, 1906, in Mortgage record 74 at page 429. That at the time said mortgage was executed and at all times theretofore and since, said mortgagor resided and has continuously resided in and had its principal place of business in said Marion County, Indiana, and that each and every one of said 1500 bonds so issued is

now outstanding, and together with the unpaid interest coupons thereon are valid subsisting obligations of said defendant Indianapolis, Crawfordville & Western Traction Company; and that the same are secured by said mortgage or deed of trust which constitutes a first lien upon all the property of said Indianapolis, Crawfordville & Western Traction Company, hereinafter fully described.

Second. It is further ordered, adjudged and decreed that at the time said mortgage or deed of trust was so executed by said Indianapolis, Crawfordville & Western Traction Company to said The Marion Trust Company, Trustee, said mortgagor was the absolute owner and in possession of certain railroad property including rights of way and appurtenances, franchises, lands, leasehold estates and privileges upon which it then proposed to construct and was engaged in constructing a line of railroad extending from a point in the City of Indianapolis, Indiana, to-wit: at the center of West Michigan street at its intersection with Holmes avenue, thence in a north-westerly direction, by way of the towns of Clermont, Brownsburg, Pittsboro, Rainstown, Lizton, Jamestown, New Ross and Mace (or Linnsburg) to and in the City of Crawfordville, and through and from said City of Crawfordville by way of the towns of Wesley,

Waynetown, Hillsboro and Veedersburg to, in and through
470 the City of Covington, Indiana, and in and through the Counties of Marion, Hendricks, Boone, Montgomery, Fountain, Warren and Vermilion in the State of Indiana, to the western boundary of said State of Indiana at a point east of the City of Danville, in the State of Illinois; having therefore acquired, purchased and fully paid for whatever interest the defendant Consolidated Traction Company had previously owned or held therein, and having entered into the full possession and enjoyment of the property so acquired from said Consolidated Traction Company.

That subsequently to the execution of said mortgage or deed of trust said Indianapolis, Crawfordville & Western Traction Company proceeded to, and did construct and complete said line of railroad, so proposed to be constructed, at the time said mortgage or deed of trust was executed, and then in process of construction, upon the line above described from a point in the City of Indianapolis, Indiana, to-wit: at the center of West Michigan Street near its intersection with Holmes avenue in said city, running thence in a north-westerly direction to a point in said city of Crawfordville, to-wit: on what are known as the Power House grounds belonging to said defendant Indianapolis, Crawfordville & Western Traction Company on the banks of Sugar Creek near where said Creek is crossed by the public highway known as the Lafayette Road, and extending through said towns of Clermont, Brownsburg, Pittsboro, Rainstown, Lizton, Jamestown, New Ross and Mace (or Linnsburg), and through said Counties of Marion, Hendricks, Boone and Montgomery and acquired certain rights, franchises, privileges, railroad tracks, switches, turnouts, sidings, rolling stock, lines of poles and wires and overhead construction, tools, machinery, appliances, equipment and other property real and personal, all of which
471 now constitute, and constituted at the time the cross bill of complaint of said The Marion Trust Company, Trustee, was

filed herein, a part of said line of railroad owned by said defendant, Indianapolis, Crawfordsville & Western Traction Company and now operated by the Receiver of said Company heretofore appointed in this cause and that since his said appointment said Receiver has under the order and direction of this Court purchased and acquired other property real and personal, on behalf of said defendant Traction Company, all of which has been incorporated into and become a part of said railroad and has become subject to said mortgage or deed of trust.

That at and prior to the time said Receiver was appointed said line of railroad, commencing at the point in said City of Indianapolis, above mentioned, and ending at the point in said City of Crawfordsville, above mentioned, upon the line above described, was operated by said defendant Indianapolis, Crawfordsville & Western Traction Company as a single line of railroad, and that each and every part and parcel of property, real, personal and mixed, and each and every right, franchise and privilege owned by said Indianapolis, Crawfordsville & Western Traction Company at the time said mortgage or deed of trust was executed, or thereafter acquired, constituted an essential part of said line of railroad and now constitutes an essential part thereof, and that since his appointment the Receiver of said Indianapolis, Crawfordsville & Western Traction Company has continuously operated the same as a single line of railroad.

That all lands, easements, contracts, rights of way, grades, bridges, stations, power houses and sub-stations, tracks, sidings, switches, turn-outs, spurs, lines of poles and wires, franchises, privileges, rolling stock, tools, machinery, equipment, materials and
 472 property of every kind, character and description, real, personal or mixed, owned by said Indianapolis, Crawfordsville & Western Traction Company at the time said mortgage or deed of trust was executed, or subsequently acquired, comprising said defendant's said line of railroad, and all earnings thereof whether before or after the appointment of said Receiver, and all property of every kind or description, whether the same was in existence and owned or possessed by said defendant Company at the time of the execution of said mortgage or deed of trust or has been since acquired by said defendant Traction Company or by the Receiver herein appointed, or by either of them, are covered by said mortgage or deed of trust so executed by said Indianapolis, Crawfordsville & Western Traction Company to said The Marion Trust Company, Trustee, and said mortgage or deed of trust is a first lien thereon for the benefit of the bond-holders secured by said mortgage or deed of trust.

That among the tracts of land owned by said defendant, Indianapolis, Crawfordsville & Western Traction Company, at the time of the appointment of said Receiver and acquired by said defendant since the execution of said mortgage or deed of trust, are the following, all of which are situated in Montgomery County, Indiana:

"Part of the east half of the northeast quarter of section thirty-one

(31) township nineteen (19) north of range four (4) west, bounded as follows:

Beginning at an iron pin in the center of the Crawfordsville and Lafayette Pike, two chains sixteen and one-half links distance in a northerly direction from the Sperry Mill and running thence south 83 degrees east, eighty-one (81) feet; thence north 69 degrees east one hundred and one (101) feet; thence north $58\frac{1}{2}$ degrees, east one hundred sixty (160) feet; thence north $44\frac{1}{2}$ degrees east sixty-six (66) feet; thence south 85 degrees and 5 minutes east eighty-two and one-half ($82\frac{1}{2}$) feet; thence south 23 degrees east twenty (20) rods eight and two-thirds ($8\frac{2}{3}$) feet; thence south eleven and one-half degrees west thirty-seven (37) rods and fourteen and one-half ($14\frac{1}{2}$) feet to Sugar Creek; thence down said stream with the meanderings thereof about forty-five (45) rods to the center of the Crawfordsville and Lafayette Pike; thence
473 north 35 degrees east three hundred and eighty-five (385) feet to the place of beginning and containing twelve and thirty hundredths ($12\frac{30}{100}$) acres, more or less.

Also, the undivided one-half ($\frac{1}{2}$) of part of the west half of the southwest quarter of section twenty-nine (29) township nineteen (19) north, range four (4) west, bounded as follows:

Beginning at a point four and one-half ($4\frac{1}{2}$) rods west of the South East corner of the West half of the Southwest Quarter of said Section Twenty-nine (29) and running thence North 28 degrees and 40 minutes West Sixteen (16) rods; thence North 8 degrees and 20 minutes West twenty-six (26) rods and ten (10) links; thence North fourteen (14) rods; thence west twenty-one and one-half ($21\frac{1}{2}$) rods; thence South 24 degrees and 30 minutes West thirteen (13) rods and Nine (9) links; thence south 10 degrees west twelve and one half ($12\frac{1}{2}$) rods; thence south 10 degrees and 30 minutes East fifteen (15) rods; thence south 42 degrees and 40 minutes east twenty (20) rods and six (6) links; thence east twenty-four (24) rods to the place of beginning, containing nine and sixty-seven hundredths ($9\frac{67}{100}$) acres more or less.

Also, the undivided one-half ($\frac{1}{2}$) of part of the west half of the Northwest Quarter of section thirty-two (32) township nineteen (19) north, range four (4) west, bounded as follows:

Beginning at a point four and one-half ($4\frac{1}{2}$) rods west of the northeast corner of the west half of the northwest quarter of said section thirty-two (32) and running thence south 18 degrees east twenty (20) rods; thence south 9 degrees and 45 minutes west twenty-four (24) rods; thence north 33 degrees and 45 minutes west, forty-seven (47) rods; thence east twenty-four (24) rods to the place of beginning, containing three and twenty-three hundredths ($3\frac{23}{100}$) acres, more or less.

Also the right of ingress and egress to and from said land along the line of the Chicago, Indianapolis and Louisville Railway, formerly the Louisville, New Albany and Chicago Railroad.

Also, the undivided one-half ($\frac{1}{2}$) of all grounds occupied by the mill dam across Sugar Creek situated in the west half of the North-

west Quarter of said Section thirty-two (32) township nineteen (19) north of range four (4) west.

Also, the undivided one-half ($\frac{1}{2}$) of all the ground occupied by the mill pond situated partly on the last mentioned tract of land and on part of the southwest quarter of said section thirty-two (32) and on part of the west half of the southeast quarter of section twenty-nine (29) and part of the west half of the southeast quarter of section twenty (20), all in township nineteen (19) north of range four (4) west.

Also, the undivided one-half ($\frac{1}{2}$) of the land and privileges of the waters of said Sugar Creek purchased by Isaac C. Elston of Abraham Horner as specified in a deed executed by said Horner and others to the said Elston on the fourth day of November, 1840, and recorded in Deed Record 9 pages 158 and 159 in the Recorder's

office of Montgomery County, Indiana, and also the undivided one-half ($\frac{1}{2}$) of the water privileges purchased of the Messrs. Stover by said Elston as specified in said deed executed by them to said Elston on the 19th day of April, 1842, and recorded in Deed Record 10, page- 153 and 154 in the Recorder's office of said County; also the land occupied by the mill race connecting said mill pond with the flouring mill situate on said lands, said race passing through part of the east half of the northeast quarter of section thirty-one (31) and through part of the west half of the northwest quarter of section thirty-two (32) township and range aforesaid.

Also, the ground necessary to widen said race so as to use the water in the most advantageous manner for driving machinery.

Also, the following described real estate in Montgomery County, Indiana:

Beginning at the southeast corner of a four acre tract of land owned by John T. and Mary T. Sheperd and running in a northeasterly direction for a distance of three hundred eighteen (318) feet, more or less to the north line of said tract; thence west for a distance of twenty-five and three-tenths ($25 \frac{3}{10}$) feet; thence in a southwesterly direction twenty-five (25) feet from and parallel to the east line of said tract for a distance of three hundred eighteen (318) feet, more or less, to the south line (or Covington Street) of said four acre tract of land; thence east twenty-five and three-tenths ($25 \frac{3}{10}$) feet along said south line to the place of beginning, the same being a strip of ground twenty-five (25) feet wide off of the east end of a four acre tract of land mentioned in Deed No. 1735, recorded in Deed Book 97, at page 603, dated June 23, 1906.

Also, the following described real estate in Montgomery County, Indiana:

Part of the east half of the northeast quarter of section thirty-one (31) in township 19, north range 4 west bounded as follows:

Beginning at a stone 625 feet west of the southeast corner of said quarter section and running thence north 2 degrees and 45 minutes east $552\frac{1}{2}$ feet; thence north 11 degrees and 15 minutes east 430 feet; thence north 42 degrees and 45 minutes west 360 feet; thence south $31\frac{1}{2}$ degrees west 460 feet; thence south $20\frac{1}{2}$ degrees west

96 feet; thence south 9 degrees and 25 minutes west 895 feet; thence north 87 degrees east 551 feet, to the place of beginning containing $12\frac{1}{2}$ acres, more or less.

Excepting from the above description the following:

Beginning at the aforesaid starting point and running thence north 2 degrees and 45 minutes east 4 chains and 82 links; thence west parallel with the south line of said tract to the west line; thence south 9 degrees and 25 minutes west 4 chains and $82\frac{1}{2}$ links to the southwest corner of said tract of land; thence north 87 degrees east 551 feet to the beginning point, which exception contains 4 acres, more or less, and the tract conveyed containing $8\frac{1}{2}$ acres, more or less.

475 That said defendant Indianapolis, Crawfordsville & Western Traction Company, after the execution of said mortgage or deed of trust to said cross-complainant, The Marion Trust Company, Trustee, acquired other property, both real and personal, in addition to that specifically described above, and that all property so acquired, and each and every part and parcel thereof, was incorporated into and became a part of its said line of railroad and equipment thereof, and was used and operated by said Indianapolis, Crawfordsville & Western Traction Company as a necessary part of said railroad down until the appointment of the Receiver thereof in this cause, and that since the appointment of said Receiver each and every part and parcel of said property so acquired has been used and operated by said Receiver as a necessary part of the said line of railroad and now constitutes an essential part thereof; and that all of said property so acquired is covered by said mortgage or deed of trust from said defendant Indianapolis, Crawfordsville & Western Traction Company to said The Marion Trust Company, Trustee.

That since his said appointment said Receiver has acquired on behalf of said defendant Railroad Company other property, both real and personal, under the order and direction of this Court, each and every part and parcel of which constitutes an integral portion of defendant's said line of railroad and is operated as a necessary part thereof and is covered by said mortgage or deed of trust from said defendant Traction Company to the said cross-complainant, The Marion Trust Company, Trustee.

That said real estate above described, and each and every part and parcel thereof, and all other property, whether real, personal or mixed, belonging to said defendant Indianapolis, Crawfords-

476 ville & Western Traction Company, whether owned at the time said mortgage or deed of trust to said The Marion Trust Company, Trustee, was executed, or since acquired, and now in the possession and control of said Receiver under the order and direction of this Court constitute essential parts of said line of railroad so constructed, owned and operated, as aforesaid, and together with all earnings and increments thereon are included in and subject to the lien of said mortgage or deed of trust from said Indianapolis, Crawfordsville & Western Traction Company to said The Marion Trust Company, Trustee.

Third. And it is now further hereby adjudged and decreed that

the line of said cross-complainant, The Marion Trust Company, Trustee, under its said mortgage or deed of trust upon the property heretofore described as covered by said mortgage, and all of it, including all earnings and incomes of said property now in the hands of said Receiver is prior, superior and paramount to any lien or claim of any other party to this suit, except as herein otherwise expressly and specifically decreed.

Fourth. It is further adjudged and decreed that by reason of the failure of said defendant, Indianapolis, Crawfordsville & Western Traction Company to pay certain coupons attached to said outstanding bonds secured by said mortgage or deed of trust to said The Marion Trust Company, Trustee, on the first day of January, 1908, which was the date of the maturity thereof, and by reason of the failure of said defendant Indianapolis, Crawfordsville & Western Traction Company to pay certain coupons maturing July 1, 1908, and certain coupons attached to said bonds maturing January 1, 1909; and by reason of the failure of said Traction Company to pay any of said coupons attached to said bonds maturing July 1, 1909, the holders of a majority of said outstanding bonds elected to and did, under the terms of said mortgage securing the same, 477 to-wit, on the 15th day of January, 1910, request said The

Marion Trust Company as Trustee in writing to declare the whole principal sum secured by said outstanding bonds, and by said mortgage or deed of trust, to be due and payable; and immediately upon receiving said request said The Marion Trust Company as Trustee in compliance therewith and pursuant to the provisions of said mortgage or deed of trust, and the bonds secured thereby, did declare said entire issue of outstanding bonds to be due and payable, and notified said defendant Indianapolis, Crawfordsville & Western Traction Company in writing of such action and demanded immediate payment of said entire indebtedness evidenced by said bonds and secured by said deed of trust, together with interest thereon.

That thereupon said mortgage and said outstanding bonds numbered from one (1) to fifteen Hundred (1500), both inclusive, as aforesaid, with unpaid interest coupons thereon, became and were immediately matured and past due, all before the filing of the cross bill of said The Marion Trust Company, Trustee, herein; and that said declaration and election of said majority bondholders to have said mortgage and outstanding bonds and coupons matured by reason of said default in the payment of interest continues in full force and effect and has never been recalled, rescinded, reversed or waived, and there is now due on the bonds secured by said mortgage or deed of trust to said The Marion Trust Company, Trustee, and coupons attached thereto the following amounts, to-wit:

478 Bonds numbered 1 to 1500, both inclusive, (Principal)	\$1,500,000.00
Interest on said principal debt evidenced by interest coupons maturing January 1, 1908, and now un- paid	1,900.00
Interest on said last mentioned coupons from date of maturity	464.23
Interest on principal debt evidenced by coupons ma- turing July 1, 1908	1,875.00
Interest on said last mentioned coupons since ma- turity	401.88
Interest on principal debt evidenced by coupons ma- turing July 1, 1909	37,500.00
Interest on said last mentioned coupons since ma- turity	5,787.50
Interest on principal debt evidenced by coupons ma- turing January 1, 1910	37,500.00
Interest on said last mentioned coupons since ma- turity	4,662.50
Interest on principal debt evidenced by coupons ma- turing July 1, 1910	37,500.00
Interest on said last mentioned coupons since ma- turity	3,537.50
Interest on principal debt evidenced by coupons ma- turing January 1, 1911	37,500.00
Interest on said last mentioned coupons since ma- turity	2,412.50
Interest on principal debt evidenced by coupons ma- turing July 1, 1911	37,500.00
479 Interest on said last mentioned coupons since maturity	1,287.50
Interest on principal debt evidenced by coupons ma- turing January 1, 1912	37,500.00
Interest on said last mentioned coupons since ma- turity	162.50
Interest on principal debt January 1, 1912, to Janu- ary 26, 1912, at 5%	5,416.67

Total amount due to date of decree \$1,752,907.78

480 That among the unpaid coupons above mentioned matur-
ing on the first day of January, 1908, were those of bonds
numbered 151 to 156, both inclusive; also those of bonds numbered
252 to 258, both inclusive; also those of bonds numbered 729 to
730, all of which were owned by William C. Mitchell of Lafayette,
Indiana.

Also coupons maturing January 1, 1908, of bonds numbered 157
to 170, both inclusive, and those of bonds numbered 513 to 519,
both inclusive, belonging to George Haywood of Lafayette, Indiana.

Also 40 coupons due January 1, 1908, and 40 coupons due July
1, 1908, owned by the estate of A. F. Ramsey.

Also 35 coupons due July 1, 1908, owned by the estate of Eli P. Baker.

All of which coupons so belonging to said Mitchell said Haywood, said estate of A. F. Ramsey, and the estate of Eli P. Baker, are hereby adjudged and decreed to be protected by the lien of said mortgage to said The Marion Trust Company, Trustee, and entitled to full payment from the proceeds of the property covered by said mortgage or deed of trust before any part thereof is applied to the payment of the bonds or other coupons secured by said mortgage.

Fourth (a). That said Indianapolis, Crawfordsville & Western Traction Company is indebted to the intervening petitioner, Security Trust Company, for Fire Insurance on the property of said Traction Company, carried subsequent to the date of said mortgage in the sum of \$3,884.20, which is hereby adjudged to be a lien upon all the property covered by said mortgage or deed of trust, and entitled to payment from the proceeds thereof prior to the payment of any of the bonds or coupons secured thereby.

481 Fourth (b). That said Indianapolis, Crawfordsville & Western Traction Company is indebted to David C. Smith and Newton M. Duckworth, partners doing business under the firm name and style of Smith & Duckworth, intervening petitioners herein, in the sum of \$104.70, of which the sum of \$11.48 is entitled to payment and is ordered paid out of the proceeds of the property covered by said mortgage or deed of trust, before any part thereof is applied to the payment of bonds or coupons secured thereby, the balance to be paid as a general claim out of any funds applicable to the payment of such claims but not otherwise.

Fifth. It is further adjudged and decreed that said The Marion Trust Company as a trustee under said mortgage or deed of trust so executed by said defendant Indianapolis, Crawfordsville & Western Traction Company, became and was from and at the time its said cross bill of complaint was filed herein lawfully entitled to institute and to conduct proceedings for the foreclosure of said mortgage in all respects as said proceedings have been taken in this suit.

Sixth. It is further ordered, adjudged and decreed that said defendant Indianapolis, Crawfordsville & Western Traction Company was at the time complainant's original bill herein was filed, indebted to said complainant Electrical Installation Company in the sum of \$3,671.65, with interest from the first day of January, 1909, all of which is still due and unpaid, and that the total sum due from said defendant to complainant to the date of this decree is \$4,336.21.

Seventh. It is further adjudged and decreed that said defendant Indianapolis, Crawfordsville & Western Traction Company was at the time said original bill of complaint herein was filed, ever since has been and now is wholly insolvent, and that complainant was and is entitled to have said railroad and property sold and the 481½ assets of said insolvent defendant marshaled, as prayed in said original bill of complaint and amendments thereto, and the proceeds distributed in accordance with this decree.

Eighth. It is further adjudged and decreed that there is due from

said defendant Indianapolis, Crawfordsville & Western Traction Company to said cross-complainant the Moore-Mansfield Construction Company upon its contracts for the construction (in part) of said defendant's line of railroad between the City of Indianapolis, Indiana, and the City of Crawfordsville, Indiana, all as set forth in the cross bill of complaint of said Moore-Mansfield Construction Company the total sum and amount (including interest to the date of this decree) of \$27,406.09, which sum said Moore-Mansfield Construction Company is entitled to have paid, and payment of which is hereby ordered ratably out of any funds of said defendant Indianapolis, Crawfordsville & Western Traction Company, that may come into the hands of the Court applicable to the payment of general debts of said defendant but not otherwise.

And it is further hereby adjudged and decreed that said cross-complainant Moore-Mansfield Construction Company is not entitled to enforce a mechanic's lien against any of the property of said defendant Indianapolis, Crawfordsville & Western Traction Company in the hands of the Receiver of this Court or elsewhere, if any; nor against the proceeds thereof, and that no such lien exists.

Ninth. It is further hereby ordered, adjudged and decreed that said defendant Indianapolis, Crawfordsville & Western Traction Company was indebted to the defendant and cross-complainant

482 William A. Guthrie at the time his cross bill of complaint herein was filed, in the sum of \$2,065.08, with interest at the rate of 6% per annum from the 20th day of October, 1909, and in the total sum to date of this decree of \$2,356.26.

That said cross-complainant William A. Guthrie is not entitled to maintain or enforce any lien against any of the property of said Indianapolis, Crawfordsville & Western Traction Company in the hands of the Receiver of this Court, or herein decreed to be covered by the mortgage or deed of trust to said The Marion Trust Company as Trustee, aforesaid, and that any apparent lien heretofore existing or asserted against said property by said William A. Guthrie, or in his behalf, is hereby adjudged and decreed to be wholly void and without effect.

Tenth. Unless said Indianapolis, Crawfordsville & Western Traction Company shall pay into the registry of this Court the total sum found due said The Marion Trust Company, Trustee, upon said bonds and coupons and all costs within ten days from the date of this decree, it is hereby further ordered, adjudged and decreed that said mortgage of said defendant, Indianapolis, Crawfordsville & Western Traction Company to said The Marion Trust Company as Trustee, be and the same is hereby foreclosed as to and against each of said defendants, Indianapolis, Crawfordsville & Western Traction Company, Consolidated Traction Company, Electrical Installation Company, Moore-Mansfield Construction Company, William A. Guthrie, Allis Chalmers Company, Edward Hawkins, Albert A. Barnes, Andrew E. Reynolds, Alanson M. Hewes, Charles N. Van Cleave, Sterling R. Holt, Peter C. Somerville, Ezra C. Voris, George Shelley and John S. Brown, and all others having or asserting any interest in or to the property covered by said mortgage, and the in-

483 comes and earnings thereof, being the same as the property heretofore described in this decree as covered by said mortgage; that said property shall be sold as hereinafter directed and decreed, and that all the right, title, estate, interest and equity of redemption of said Indianapolis, Crawfordsville & Western Traction Company and said Consolidated Traction Company, and of each and all of the parties to this suit, and of all persons claiming, or to claim under them, or any of them of, in and to said railway, rights, franchises, and other property, and every part and parcel thereof shall from and after such sale be forever barred and foreclosed, save and except only such right or rights as may be specifically reserved under the provisions of this decree.

Such sale shall be free from any appraisal, right of redemption or extention; and Edward Daniels is hereby appointed Special Master of this Court and is hereby appointed, directed and authorized to make, direct and conduct said sale, and to execute and deliver a deed or deeds of conveyance of the property to be sold to the purchaser thereof, pursuant to the order confirming said sale when made, and upon payment, as herein provided, of the purchase price thereof.

The Court, however, reserves the right either in term time or in chambers and without notice in case of death, inability or removal of said Special Master to appoint any other qualified person to act as Master in his stead with like powers as those with which said Special Master is clothed.

Eleventh. It is hereby further ordered, adjudged and decreed that all of said railroad and other property of said Indianapolis, Crawfordsville & Western Traction Company, and all rights and franchises of said Company, and of said Receiver whether in possession or not, and whether held by legal or equitable title shall be sold together as a whole without division into parcels for the purpose of either offerings or sale.

484 Twelfth. That the sale herein ordered shall be made at public auction to the highest bidder at the power house of said defendant Indianapolis, Crawfordsville & Western Traction Company at the City of Crawfordsville, Montgomery County, Indiana, upon the premises of said defendant Indianapolis, Crawfordsville & Western Traction Company on a day and at an hour to be fixed by said Master, and notice of the time and place of said sale describing said property, rights and franchises to be sold, and referring to this decree for further particulars shall be published at least once each week for the term of four consecutive weeks preceding the day of sale in at least one newspaper printed in, regularly issued at and having a general circulation in the city of Indianapolis and Marion County, Indiana; and also like publication in a newspaper printed in and regularly issued at and having a general circulation in said City of Crawfordsville and Montgomery County.

Said Master shall receive no bid from any one offering to bid for said property and franchises who shall not at or prior to the time of making such bid deposit with him as a pledge that he will make good his bid in case of its acceptance, the sum of Fifty Thousand

(\$50,000) Dollars in money or in a certified check upon a National Bank or Trust Company of the City of Indianapolis for a like amount.

The deposit received by said Master from any unsuccessful bidder shall be returned to such bidder when the property shall be struck off. In case any bid shall be accepted and the successful bidder shall comply with the terms thereof, and said sale be confirmed the deposit so made shall be credited on the purchase price. In the event that any bidder shall fail to make good his bid upon acceptance by said Master said deposit shall be forfeited as liquidated damages, and shall be applied towards the expenses of any re-sale which
485 may be ordered; or, towards making good a deficiency or loss in case the property at such sale shall bring less than the prior sale, as the Court shall direct; but, if said sale shall not be confirmed the deposit shall be returned to the bidder.

Said Master shall receive no bid of less than One Million (\$1,000,000) Dollars, and in case said sum, or more shall not be bid he shall adjourn the sale and apply to the Court for further instructions. Any party to this suit and any holder or holders of any of said bonds secured by the mortgage foreclosed by this decree may bid and purchase at said sale. All sums of money received upon such sale, shall be paid into the registry of the Court, and of said money the sum of Thirty-one Thousand (\$31,000) Dollars shall be held in the registry of the Court to abide the result of an appeal by the Moore-Mansfield Construction Company, in the event said Moore-Mansfield Construction Company shall prosecute an appeal from this decree; the same to be disposed of by the order of this Court upon the determination of the appeal or appeals of the said Moore-Mansfield Construction Company in the event that an appeal is taken, in accordance with the opinion of the Court to which such appeal shall be taken. And in the event the said Moore-Mansfield Construction Company shall fail upon such appeal or appeals or shall fail to perfect an appeal from this decree said sum to be subject to the order of this Court in all respects pursuant to the terms of this decree.

The Master shall report such sale to the Court for its action thereon with all reasonable and convenient speed after the same shall have occurred, in accordance with the usual practice in such cases.

The purchaser may pay the price at which said property
486 shall be sold in cash or may satisfy and make good his bid in whole or in part by turning in, at their distributive value to be canceled or credited, any of said bonds and coupons secured by said mortgage hereby foreclosed, except and provided always that in no event shall said purchaser be permitted to pay less than the sum of One Hundred Thousand (\$100,000) Dollars in cash, including the Fifth Thousand (\$50,000) Dollars required to be paid with or prior to his bid; and such purchaser shall be credited for said bonds and coupons so turned in on account of the purchase price with such sums in cash as would be payable on said bonds and coupons, out of the proceeds of the sale, if the whole amount of the purchase price were paid in cash. If any of the bonds and coupons

are credited at less than their face value they shall be stamped by the Master with a credit equal to that at which they are received and shall then be returned to the respective holders. The Court reserves the right to direct a re-sale of the property upon the failure of the purchaser to comply with the terms of sale, or with any order of the Court requiring further payment or performance within ten days after service upon such purchaser of a certified copy of such order.

The purchaser as a part of the consideration and purchase price of the property, and in addition to the sum bid, takes the same and receives the deed therefor upon the express condition that he or his successors or assigns shall perform and carry out all pending contracts heretofore or hereafter made by the Receiver with respect to the property sold; and that he will pay any and all indebtedness, liabilities and obligations which have been or may hereafter be incurred or contracted by said Receiver in the operation, or on account of said property directed to be sold at any time prior to his discharge as such

Receiver; and also that he, or his successors or assigns, will
487 pay any indebtedness or liability contracted by said defendant Indianapolis, Crawfordsville & Western Traction Company prior to the appointment of said Receiver with respect to which a petition or intervention or proof of claim has heretofore been or may hereafter be filed in this cause which the Court shall adjudge to be entitled in equity to payment prior to the payment of the bonds secured by the mortgage foreclosed by this decree.

In the event said purchaser, his successors or assigns, shall refuse after demand to pay any of the before mentioned indebtedness so assumed and agreed to be paid by said purchaser, or carry out and perform any of the contracts of said Receiver so assumed and agreed to be performed by said purchaser the person holding such claim, or the obligee under such contract may, upon ten days' notice to such purchaser or his successors or assigns, file his petition in this court to have such claim enforced or such contract performed in accordance with the usual practice of this court in such cases, and such purchaser, his successors or assigns shall have the right to appear and make defense to any claims or demands so sought to be enforced, but either party shall have the right to appeal from any judgment, decree or order made thereon.

Thirteenth. Jurisdiction of this cause is retained by the Court for the purpose of making further orders and decrees concerning the enforcement of the foregoing provisions of this decree, and the Court reserves the right to re-take and re-sell all of said property in case the purchaser, his successors or assigns, shall fail to comply with any order of the Court in respect of the payment of any such prior indebtedness or performance of any such contract within ten days after the service of a copy of any such order.

488 Fourteenth. Any indebtedness or liabilities of, or claims against said Receiver remaining unpaid at the time of the delivery to the purchaser, his successors or assigns, of the property sold under this decree shall be presented in writing to the Receiver for allowance within sixty days after the first publication by the Receiver of a notice to the holders of such indebtedness, liabilities

or claims, which notice said Receiver is hereby ordered and directed to publish at least once a week for a period of four successive weeks in one or more newspapers published in each of the Cities of Indianapolis, Indiana, and Crawfordsville, Indiana, the first of said publications to be made within thirty days after the confirmation of said sale; and any such liability or claim not so presented within said period of sixty days shall not be enforceable against said Receiver or against the property sold under this decree.

Fifteenth. It is hereby further ordered, adjudged and decreed that the funds arising from such sale shall be applied and paid in the following order of priority:

1st. To the payment of the costs and allowances of this cause, and all proper expenses attendant upon said sale, including such compensation to the Master appointed to make said sale, and such charges, compensations and allowances to said Receiver, and of said The Marion Trust Company, Trustee under said mortgage foreclosed by this decree, and its counsel and solicitors and such other allowances, if any, as the Court may hereafter fix, allow and direct to be paid.

2nd. To the payment of such claims against said Indianapolis, Crawfordsville & Western Traction Company as the Court has
489 adjudged or may hereafter adjudge to be liens in law or in equity against said property of said Indianapolis, Crawfordsville & Western Traction Company, and entitled to payment prior to the bonds and coupons or charges secured by said mortgage or deed of trust, with interest thereon to date of payment.

3rd. To the payment of the amounts hereinbefore found to be due said Security Trust Company, with interest thereon to date of payment.

4th. To the payment of the respective amounts heretofore found to be due upon the coupons maturing on and prior to January 1, 1909, as described in the Fourth Paragraph of this decree; and such other coupons maturing on or prior to January 1, 1909, if any, remaining unpaid, as the Court may hereafter adjudge and decree entitled to such payment, with interest thereon to date of payment.

5th. To the payment ratably and without preference or priority of one over the other, of the amounts hereinbefore found to be due upon the bonds and coupons (other than those mentioned in the Fourth Subdivision of this Paragraph) secured by said mortgage or deed of trust of said defendant, Indianapolis, Crawfordsville & Western Traction Company to said The Marion Trust Company, Trustee, with interest on said bonds and coupons respectively to the date of payment or until the date when the same shall be required to be presented for payment, as provided in this decree.

6th. If after making all the above payments there shall be a surplus remaining the same shall be applied as the Court may hereafter order and direct.

490 Sixteenth. Whenever said Master shall have received from the purchaser at said sale moneys applicable to the payment of said bonds and coupons secured by said mortgage hereby foreclosed, except such bonds and coupons as shall have theretofore been

turned in by the purchaser to be credited on the purchase price of said property, the Master shall give notice of the time when and place where said bonds and coupons shall be presented for payment by publishing such notice at least twice in a newspaper of general circulation in the City of Indianapolis, and by mailing a copy of said notice to said The Marion Trust Company, Trustee, at least seven days before the date when such bonds or coupons are required to be presented.

If the holders of any bonds or coupons required to be presented by the notice of the Master given, as aforesaid, shall fail to present the same for payment at the time and place mentioned in such notice then the holders of such bonds or coupons shall not be entitled to payment of any interest thereon after the date specified in such notice out of the proceeds of said sale.

All bonds and coupons which are paid in full from the proceeds of said sale shall be canceled and retained by the Master.

Seventeenth. Upon the payment of the purchase price bid by the purchaser and confirmation of said sale, the Master shall execute and deliver to said purchaser, his successors or assigns a proper instrument or instruments of conveyance, assignment and transfer of the property sold hereunder, and upon the execution and delivery of said instrument or instruments the grantee or grantees therein shall be let into possession of the property conveyed and
491 transferred, and the Receiver shall deliver all the premises and property sold which may be in his possession, or under his control to the purchaser, his successors or assigns.

Eighteenth. The purchaser and his successors or assigns after such delivery of the premises and property sold, shall hold, possess and enjoy the same and all rights, privileges, immunities and franchises appertaining thereto as fully and completely as the defendant Indianapolis, Crawfordsville & Western Traction Company or its predecessor interest, or the Receiver at any time heretofore have held, or now hold, possess or enjoy the same, or held or enjoyed, or were entitled to hold or enjoy the same at the time of the execution of the mortgage hereby foreclosed, or at any time; and the purchaser and his assigns shall thereupon be entitled to have and to hold the premises so conveyed free and clear of any lien or incumbrance of any of the parties to this suit, or those claiming under them except as in this decree otherwise expressly and specifically reserved.

Nineteenth. It is further ordered, adjudged and decreed that the defendant Indianapolis, Crawfordsville & Western Traction Company and the Consolidated Traction Company as a further assurance to the purchaser, his successors or assigns under such deed or deeds of the Master shall execute a deed or deeds and thereby shall convey and release to said purchaser, his successors or assigns all of their respective rights, titles and interests in and to said railway, franchises and other property so conveyed by such deed or deeds executed by the Master; and said The Marion Trust Company, Trustee,
492 shall execute a deed or deeds of the property herein adjudged to be subject to the lien of its mortgage and thereby shall transfer and release to such purchaser, his successors or assigns, all

of the right, title and interest to such trustee under said mortgage in or to the property so conveyed; and further that the Receiver by joining in such deed or deeds of the Master or by executing a separate good and sufficient deed or deeds shall convey, transfer and assign to such purchaser and his assigns all the right, title and interest of such Receiver in and to the property so conveyed by said Master.

Twentieth. All questions not hereby disposed of including the discharge of the Receiver, the settlement of his accounts and the allowance of claims against said Indianapolis, Crawfordsville & Western Traction Company, incurred by it before the appointment of said Receiver, with or without right of priority of payment of said bonds secured by said mortgage foreclosed by this decree, are hereby reserved for future adjudication; any party to this cause and any intervening petitioner, and any holder of any indebtedness, obligation or liability contracted or incurred by the Receiver, or any holder of a claim against said Indianapolis, Crawfordsville & Western Traction Company which has heretofore been or may hereafter be filed herein may at any time apply to this Court for further orders and directions touching the matters undisposed of by this decree and jurisdiction of this cause is retained by this Court for this purpose, and for the purpose of enforcing all the provisions of this decree.

Twenty-first. It is further hereby ordered, adjudged and decreed that in the event an appeal shall be prosecuted from this decree by the Moore-Mansfield Construction Company such appeal shall in no event operate to affect or delay or interfere in any
493 manner with the sale of said property covered by said mortgage or deed of trust, and hereinbefore set out and described, but the sale thereof shall proceed in all respects as if said appeal had not been taken, and the purchaser shall take the same free from any interest, claim or lien of the said Moore-Mansfield Construction Company, and the interest, claim or lien of said Moore-Mansfield Construction Company, if upon an appeal it shall be adjudged to have a lien, shall be and is hereby transferred to the fund of Thirty-one Thousand (\$31,000) Dollars of the funds derived from the sale of such property as hereinbefore in Paragraph "Twelfth" directed to be retained in the registry of this court pending such appeal.

But if said Moore-Mansfield Construction Company shall fail to secure a reversal of this decree upon appeal, it shall be liable to said The Marion Trust Company, Trustee, for the benefit of the bondholders secured by said deed of trust upon its appeal bond for interest accruing on said Thirty-one Thousand (\$31,000) Dollars, during the period distribution thereof is delayed by said appeal, together with all costs and damages occasioned by said appeal, and said appeal bond shall so provide.

Twenty-second. It is further hereby ordered, adjudged and decreed, that in the event any appeal shall be prosecuted from this decree by any party thereto, other than said The Marion Trust Company, Trustee, or said Moore-Mansfield Construction Company, such

appeal shall in no event operate to delay, interfere with or affect the sale of said property covered by said mortgage or deed of trust, but the sale thereof shall proceed in all respects as if said appeal had not been taken, and the purchaser shall take the same free from any interest, claim or lien of said party so appealing,

494 if any shall be finally determined to exist, shall be and is hereby transferred to and ordered to be paid out of a fund of \$5,000.00, which is hereby set aside out of the money paid into the registry of the court, and which shall be held in said registry until the determination of such appeal, and thereupon applied to the payment of such claim or claims, if any, as shall be finally adjudged, paramount and prior to the lien of said bondholders under the said mortgage or deed of trust; but no such appeal shall delay the distribution of the proceeds of said sale to the holders of said bonds and coupons in accordance with this decree, except as to said sum of \$5,000.00 so ordered to be held in the registry of said court; nor shall any such appeal operate so as to delay the payment of any costs or allowances made by this Court in said cause; and any sum or sums remaining in the registry of said Court, or in the hands of said Receiver, after the payment of all costs, allowances, charges or claims adjudged to be prior in equity to the rights of said bondholders shall be distributed to the holders of said bonds and coupons in accordance with the provisions of this decree.

Twenty-third. It is further hereby ordered, adjudged and decreed that a copy of this decree issued by the Clerk of this Court, certified under his hand and the seal of this Court with proper precept of sale shall be sufficient authority to said Master to execute the same.

All of which is hereby finally ordered, adjudged and decreed by this Court.

495 And afterwards, to-wit: at the November term of said District Court, on the 26th day of January, 1912, before the Honorable Albert B. Anderson, one of the Judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company by W. A. Ketcham, Esq., its solicitor and files its motion to amend and modify paragraph Eighth (8th) of the decree herein, which motion is in the words following, to-wit:

The cross-plaintiff, the Moore-Mansfield Construction Company moves the court to amend and modify the Eighth Paragraph of the decree herein and to make the same more definite and specific by stating and showing in what respect the Moore-Mansfield Construction Company is adjudged to be not entitled to a mechanic's lien upon the railroad property as alleged in its cross-bill herein, and whether said adjudication and decree is based (a) upon the ground that the cross-plaintiff being a contractor is as such not entitled to a mechanic's lien under the laws of the State of Indiana, notwithstanding the decision of the Supreme Court of the State in that behalf prior to the decision in the case of the Indianapolis and Northern Traction Co. vs. Brennan et al., as alleged in said

cross-bill, and that the claim in that behalf of the Moore-Mansfield Construction Co. that the statute of Indiana as so construed by said Supreme Court constitutes an impairment of the obligation of a contract is not tenable in law.

(b) Upon the ground that the Moore-Mansfield Construction Co. being a corporation was not entitled to take or enforce a mechanic's lien, and that the contention of the Moore-Mansfield Construction Co. that such construction of the statute constitutes an impairment of the obligation of a contract is not tenable in law.

496-515 (c) Upon the ground that the Moore-Mansfield Construction Co. in and by the contract entered into by and between the Electrical Installation Co., the Indianapolis, Crawfordsville and Western Traction Co. and the Moore-Mansfield Construction Co. on the 6th day of June, 1906, had as against the holders of bonds secured by the deed of trust, waived its right to take and enforce a mechanic's lien, notwithstanding the statute in such cases made and provided, and notwithstanding the fact that the mechanic's lien laws as construed by the Supreme Court in the Indianapolis, Northern Traction Co. vs. Brennan et al., and the cases following it, as so construed, constitute an impairment of the obligation of a contract as forbidden by the Constitution of the United States.

(d) Whether said Paragraph No. 8, of said decree holding that the Moore-Mansfield Construction Co. is not entitled to take and enforce a mechanic's lien was entered upon either or any of the above grounds, (a), (b), and (c), or upon any other grounds, and if so upon what grounds.

To the end that it may affirmatively appear and be made known in said decree what was the basis of the court's conclusion that this cross-plaintiff was not entitled to take and enforce its lien upon said railroad property as claimed in and by its cross-bill and as adjudged against said Moore-Mansfield Construction Co. in and by said Paragraph No. 8.

WILLIAM A. KETCHAM,
*Solicitor for Moore-Mansfield
Construction Company.*

And thereupon the Court having heard the argument of counsel and duly considered the same and being sufficiently advised in the premises overrules said motion herein.

516 And afterwards, to-wit: at the May Term of said Court, on the 10th day of June, 1912, before the Honorable Albert B. Anderson, one of the Judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company, by counsel and files its petition for Appeal and assignment of Errors herein, in the words following, to-wit:

The Moore-Mansfield Construction Company, one of the defendants in the original bill in the above entitled cause and complainant in it scross-bill, conceiving itself aggrieved by the decree entered

in the above entitled cause on the 26th day of January, 1912, does hereby appeal from said decree to the Supreme Court of the United States, and prays that its appeal may be allowed and that a transcript of the record and proceedings and paper, duly authenticated, upon which said decree was made may be sent to the Supreme Court of the United States. An assignment of the errors relied upon is filed herewith.

H. S. WORTHINGTON &
WILLIAM A. KETCHAM,

Solicitors for the Moore-Mansfield Construction Company.

517

Assignment of Errors.

The Court erred:

I.

In holding that the opinion and judgment of the Supreme Court of Indiana in the case of the Indianapolis & Northern Traction Company, et al., v. Brennan, et al., reported in volume 174 of the reports of the Supreme Court of Indiana beginning at page 1, and the cases subsequently decided by said Supreme Court of Indiana on the authority of said Brennan case, in which that court held that under mechanic's lien law of the State of Indiana, contractors and sub-contractors were not entitled to take and hold a mechanic's lien upon the property upon which they had performed and had caused to be performed labor and had furnished and caused to be furnished materials, did not constitute an impairment of the obligation of the contracts dated Feb. 21st 1906 and June 6th 1906, into by and between the Moore-Mansfield Construction Company and the Indianapolis, Crawfordsville & Western Traction Company for the erection and construction of the railroad of said traction company, this assignment of error being based upon Section 10 of Article I of the constitution of the United States.

II.

In adjudging and decreeing that the lien of the trust deed executed by the Indianapolis, Crawfordsville & Western Traction Company, Trustee, and the bonds secured thereby, constituted a lien upon the railway property of the Indianapolis, Crawfordsville & Western Traction Company prior and paramount to the lien of the Moore-Mansfield Construction Company.

III.

In adjudging and decreeing that the amount due The Moore-Mansfield Construction Company on account of the materials
518 furnished and work and labor done by it in the erection and construction of said Indianapolis, Crawfordsville & Western Traction Company did not amount to \$30,406.09, but to the sum of \$27,406.09.

IV.

In adjudging and decreeing that the Moore-Mansfield Construction Company had waived its right to take, hold and maintain and enforce a mechanic's lien upon said railroad for the work and labor done and performed and the materials furnished by it in the erection and construction of said railroad.

V.

In not adjudging and decreeing that the Moore-Mansfield Construction Company *abd* and has an equitable lien upon said railroad property by reason of the work and labor done and performed and materials furnished and caused to be furnished by it in the erection and construction of said railroad which was cognizable in a court of equity and which was senior and paramount to the equities of any of the other parties to this cause.

A. S. WORTHINGTON &
W. A. KETCHAM,

Solicitors for the Moore-Mansfield Construction Company.

And thereupon it is ordered that said appeal be, and the same is hereby, allowed upon the filing of a bond in the penal sum of \$7,500.00.

519 And afterwards, to-wit: at the May Term of said Court, on the 13th day of June, 1912, before the Honorable Albert B. Anderson, one of the Judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company by counsel and files its appeal bond herein in the penal sum of \$7,500.00 with Stoughton A. Fletcher, Esq., as surety thereon which bond is approved by the Court and is in the words following, to-wit:

Know all men by these presents, That we Moore-Mansfield Construction Company as principal and Stoughton A. Fletcher as surety are held and firmly bound unto the above named Electrical Installation Company, William A. Guthrie, Allis-Chalmers Co., Marion Trust Co., Trustee, Indianapolis, Crawfordsville & Western Traction Company and Consolidated Traction Co. in the sum of (\$7,500.00) seventy five hundred dollars to be paid to said obligees, to which payment, well and truly to be made, we bind ourselves jointly and severally, and our heirs, executors and administrators, jointly by these presents.

Sealed with our seals and dated this 10th day of June 1912.

Whereas, the above named Moore-Mansfield Construction Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the Decree rendered in the above entitled suit, by the District Court of the United States for the District of Indiana:

Now, therefore, the condition of this obligation is, that if the above named Moore-Mansfield Construction Company shall prosecute its said appeal to effect and answer all costs and damages that may be

520 adjudged or awarded against it if it shall fail to make good its plea, then this obligation — be void; otherwise in full force.

THE MOORE-MANSFIELD CONSTRUCTION CO.,
By HENRY A. MANSFIELD, *President*. [SEAL.]
S. A. FLETCHER. [SEAL.]

Sealed and delivered in presence of

Witness:

WM. J. CONDREY.
EVANS WOOLEN,

Witness as to Signature of S. A. Fletcher.

[SEAL.]

Taken and approved by me this 13th day of June 1912.

ALBERT B. ANDERSON, *Judge*.

And thereupon it is ordered by the Court that said appeal be, and the same is hereby, allowed.

And afterwards, to-wit: at May Term of said Court, on the 26th day of June, before the Honorable Albert B. Anderson, one of the Judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Moore-Mansfield Construction Company by counsel and files its petition for an extension of time herein, in the words following, to-wit:

Your petitioner the Moore-Mansfield Construction Co. would respectfully represent and show;

1. That it has prayed an appeal from the decree in the above entitled cause to the Supreme Court of the United States.

2. That with its petition for appeal, your petitioner filed its assignment of errors and said appeal has been allowed.

3. That your petitioner has filed its appeal bond, which has been approved by the Court.

521 4. That a citation has been duly issued upon such appeal, and each and every of the appellees have acknowledged service thereof.

5. That your petitioner has filed with the Clerk of this Court a Precipe for a transcript upon such appeal and in connection therewith the stipulation by each and every, the parties to said appeal, touching, the record to be certified and transmitted by the Clerk of said Court.

6. That your petitioner has been advised and informed by the Honorable, the Clerk of this Court, that it will be utterly impossible for him within the time limited for transmitting the transcript on said appeal to the Clerk of the Supreme Court of the United States, by reason of the length of said transcript.

Your petitioner therefore prays for an order extending the time for 90 days within which to prepare, certify, transmit and file said

transcript with the Clerk of the United States Court and within which to perfect said appeal. And your petitioner will ever pray, etc.

MOORE-MANSFIELD CON. CO.,
By A. S. WORTHINGTON &
WILLIAM A. KETCHAM,
Its Solicitors.

And thereupon the Court being sufficiently advised grants said petition, and said petitioner is hereby granted an extension of ninety days in which to file its transcript of appeal in the United States Supreme Court.

522 United States District Court, District of Indiana.

No. 10961, Chancery.

On Bill.

ELECTRICAL INSTALLATION CO.

VS.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION Co. et al.

and

On Cross Bill.

MOORE-MANSFIELD CONSTRUCTION CO.

VS.

ELECTRICAL INSTALLATION Co. et al.

*Precipe for Transcript for Appeal to Supreme Court of the
United States.*

To the Hon. Noble C. Butler, Clerk of the said Court:

You will please make out and certify a transcript of the papers filed, proceedings had, decree entered for an appeal to the Supreme Court of the United States, granted by Judge Anderson, embracing in said transcript among others the following papers, orders, decrees and entries to-wit: including all order book entries showing the filing of said papers or either or any of them.

1. The original Bill of complaint, filed in said cause on the 26th day of June 1909, together with the subpoena in Chy. issued thereon and the Marshal's return thereto, together with the amendment thereto filed on the 9th day of July 1909, and all answers and replications by either or any of the parties to said action to said original or amended bill.

2. The cross-bill of the cross plff. the Indianapolis, Crawfordsville & Western Traction Co. filed in said cause on the 8th day of July

1909 and all answers and replications by either or any of the parties to said action to said cross-bill.

3. The cross-bill of the cross-plff. the Moore-Mansfield Construction Co. filed on the 6th day of December 1909, together with all answers and replications by either or any of the parties to said action to said cross-bill, including also the subpoena in Chancery issued thereon with the return of service thereon.

4. The cross-bill of the cross-plff. the Marion Trust Co. Trustee, filed Jan. 29th 1910 with all amendments thereto and all answers and replications by either or any of the parties to said action to said cross-bill, including also the subpoena in chancery issued thereon, with the return of service thereon.

5. The cross-bill of the cross-plff. Guthrie, filed June 18th 1910, and all amendments thereto with all answers and replications by either or any of the parties to said action to said cross-bill.

6. The order of Oct. 24th 1910, referring the case to the Special Master to report on the facts.

523 7. The Report of the Special Master on the facts filed April 12th 1911, omitting however, the transcript of the evidence filed with said report.

8. The Decree of foreclosure and sale entered on the 26th day of Jan. 1912.

9. The Motion by the Moore-Mansfield Construction Co. to make the decree more specific filed on the 26th day of Jan. 1912, and order thereon of court.

10. The Report of Sale by the Special Master filed Apr. 13th 1912, and order thereon.

11. The Supplemental report of sale by the Special Master filed Apr. 27, 1912, and order thereon.

12. Prayer for appeal with assignment of errors, order allowing appeal and entry of filing and approval of bond.

MOORE-MANSFIELD CONSTRUCTION CO.

Appellant,

By A. S. WORTHINGTON AND

WILLIAM A. KETCHAM,

Its Solicitors.

No. 10961, Chancery.

On Bill.

ELECTRICAL INSTALLATION CO.

VS.

INDIANAPOLIS, CRAWFORDSVILLE & WESTERN TRACTION CO. et al.

and

On Cross Bill.

MOORE-MANSFIELD CONSTRUCTION CO. et al.

VS.

ELECTRICAL INSTALLATION CO. et al.

Stipulation as to Transcript.

It is hereby stipulated by and between the parties to the appeal in the above and foregoing case to-wit:

The Moore-Mansfield Construction Co. the appellant and the Electrical Installation Co. the Indianapolis, Crawfordsville & Western Traction Co., The Marion Trust Co., Trustee, William A. Guthrie, the Allis-Chalmers Co. and the Consolidated Traction Co., the appellees, that the papers, orders, decrees and proceedings mentioned and set forth in the above and foregoing precipe for a transcript constitute all the — necessary to enable the Supreme Court to fully and completely determine an appeal of the said Moore-Mansfield Construction Co. and said Appellees do not nor does either of them desire that any other or further paper, order, decree or proceeding shall be by said Clerk embraced in said transcription upon said appeal.

525 Indianapolis, Ind., June, 1912.

THE MOORE-MANSFIELD CONSTRUCTION CO., *Appellant*,By A. S. WORTHINGTON AND
WILLIAM A. KETCHAM,*Its Solicitors.*THE ELECTRICAL INSTALLATION
CO., *Appellee*,By JAMES W. NOEL,
FYFFE & ADCOCK,*Its Solicitors.*THE INDIANAPOLIS, CRAWFORDSVILLE
& WESTERN TRACTION CO., *Appellee*,By SMITH, DUNCAN, HORN BROOK &
SMITH, *Its Solicitors*,

THE MARION TRUST CO., *Trustee, Appellee*,
 By MILLER, SHIRLEY, MILLER & THOMP-
 SON, *Its Solicitors*.
 WILLIAM A. GUTHRIE, *Appellee*,
 By MARK H. MILLER, *Its Solicitor*.
 THE ALLIS-CHALMERS CO., *Appellee*,
 By HAWKINS & HAWKINS, *Its Solicitors*.
 THE CONSOLIDATED TRACTION CO.,
Appellee,
 By WALKER & HOLLET, *Its Solicitors*.

526 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in said Court in the cause of Electrical Installation Company vs. Indianapolis, Crawfordsville & Western Traction Company, et al., according to the præcipe for transcript filed in said cause, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said Court, at Indianapolis in said District, this 7th day of October, A. D. 1912.

[Seal District Court of the United States, District of Indiana.]
 NOBLE C. BUTLER, *Clerk*.

527 *Chancery.*

United States of America to Electrical Installation Company, William A. Guthrie, Allis-Chalmers Company, Marion Trust Company, Trustee, Indianapolis, Crawfordsville and Western Traction Company, and Consolidated Traction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington thirty days after the date hereof, pursuant to an appeal which has been allowed by the District Court of the United States for the District of Indiana, from its final decree in a suit wherein The Moore-Mansfield Construction Company is Appellant, and you are Appellee, to show cause, if any there be, why the decree rendered against the said Appellant as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness The Honorable Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana, this 13th day of June, in the year of our Lord, one thousand nine hundred and twelve.

[Seal District Court of the United States, District of Indiana.]
 ALBERT B. ANDERSON, *Judge*.

[Endorsed:] 10961. Citation.

528 We hereby acknowledge service of the within citation This
22nd day of June 1912.

THE ELECTRICAL INSTALLATION
CO., *Appellee*,

By JAMES W. NOEL, *Its Solicitor*.

THE INDIANAPOLIS, CRAWFORDSVILLE
& WESTERN TRACTION CO., *Appellee*,

By SMITH, DUNCAN, HORN BROOK &
SMITH, *Its Solicitor*.

THE MARION TRUST CO., *Trustee, Appellee*,

By MILLER, SHIRLEY, MILLER & THOMP-
SON, *Its Solicitor*.

WILLIAM A. GUTHRIE, *Appellee*,

By MARK H. MILLER, *Its Solicitor*.

THE ALLIS-CHALMERS CO., *Appellee*,

By HAWKINS & HAWKINS, *Its Solicitor*.

THE CONSOLIDATED TRACTION CO.,
Appellee,

By WALKER & HOLLETT, *Its Solicitor*.

529 & 530 UNITED STATES OF AMERICA, *et al.*:

In the Supreme Court of the United States, October Term, 1913.

File No. 23321. Term No. 358.

MOORE-MANSFIELD CONSTRUCTION Co., Appellant,

vs.

ELECTRICAL INSTALLATION COMPANY et al., Appellees.

Stipulation as to Printing of Record.

It is hereby stipulated by and between the parties to the above and foregoing appeal that for the proper presentation of all the questions upon said appeal the papers named and set forth in the annexed list designated as Exhibit A shall be printed. It is further stipulated that the papers set forth in the annexed list, designated as Exhibit B shall not be printed, the same being unnecessary for the consideration of the appeal herein. It is further stipulated that when the papers in said list A are printed, the printed record will properly and sufficiently show everything necessary to the proper and complete consideration and determination of the appeal herein.

Witness the names of the said appellant, The Moore-Mansfield Construction Co., the said appellees, the Marion Trust Co., The Electrical Installation Co., and The Indianapolis, Crawfordsville and

Western Traction Co., each by the hand of its respective solicitor at Indianapolis, Indiana, this 11th day of March, 1914.

MOORE-MANSFIELD CONSTRUCTION CO.

Appellant,

By WILLIAM A. KETCHAM,

Its Solicitor.

MARION TRUST COMPANY, TRUSTEE,

Appellee,

By C. C. SHIRLEY,

Its Solicitor.

ELECTRICAL INSTALLATION CO.,

Appellee,

By JAMES W. NOEL,

*Its Solicitor.*INDIANAPOLIS, CRAWFORDSVILLE &
WESTERN TRACTION CO.

Appellee,

By CHAS. W. SMITH,

Its Solicitor.

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EXHIBIT A.

List of Papers in Record Which Should Be Printed.

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Answer of Moore-Mansfield Co. to bill of complaint.....	43
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[Endorsed:] Moore-Mansfield Cons. Co. List of papers to be printed in record.

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EXHIBIT B.

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Petition of I. C. & W. Trac. Co. for leave to file cross bill.
 Order appointing receiver.
 " approving receiver's bond.
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 Subp. and ret. on amend. bill complaint.
 Exhibit B to Moore-Mansf. Cross bill.
 Subpena & return on Moore-Mansf. Cross bill.
 Exhibit B to Cross bill of Marion Tr. Co.
 " C " " " " " "
 Subpena on Marion Tr. Co. cross bill.
 Ans. of Marion Tr. Co. to original and amended bill.
 Ans. of Elec. Install. Co. to Cross bill of Marion Trust Co.
 Replication of Elec. Install. Co. to ans. of Marion Trust Co.

- Replication of Marion Tr. Co. to ans. of Electr. Install. Co.
 Ans. I. C. & W. Trac. Co. to bill of complaint.
 " " " " " " " " to cross bill Marion Tr. Co.
 Replication of Electric. Install. Co. to ans. of I. C. & W. Trac. Co.
 Replication of Marion Trust Co. to I. C. W. Trac. Co.
 Ans. of William A. Guthrie to original bill as amended.
 Exhibit A to foregoing ans.
 Ans. W. A. Guthrie to cross bill Marion Tr. Co.
 Ans. W. A. Guthrie to cross bill Moore-Mansf. Co.
 Ans. Consolidated Tr. Co. to cross bill Marion Trust Co.
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 Petition of W. A. Guthrie for leave to file cross bill.
 Leave granted.
- 534 Cross bill of W. A. Guthrie.
 Demur-er of Marion Tr. Co. to Cross bill of Guthrie.
 Replication of Marion Trust Co. to ans. of Guthrie.
 Dismissal of " " " cross bill as to H. J. Mulligan,
 Receiver, and default & decree pro confesso as to defts. Geo. Shelly
 & John S. Brown.
 Ans. Moore-Mansf. Co. to cross bill of W. A. Guthrie.
 Replication Moore-Mansfield Co. to ans. of W. A. Guthrie.
 Ans. Elec. Install. Co. to cross bill of W. A. Guthrie.
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 Order confirming report of sale.
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[Endorsed:] Moore-Mansfield Constr. Co. List of Papers Not
 to be printed.

- 535 [Endorsed:] Supreme Court of the United States. Moore-
 Mansfield Construction Company, appellant, vs. Electrical
 Installation Company et al. No. 358. October Term, 1913. Stipu-
 lation as to printing of Record.

536 [Endorsed:] File No. 23,381. Supreme Court U. S. October term, 1913. Term No. 358. Moore-Mansfield Construction Co., appellant, vs. Electrical Installation Co. et al. Stipulation to omit parts of record in printing. Filed March 16, 1914.

Endorsed on cover: File No. 23,381. Indiana D. C. U. S. Term No. 358. Moore-Mansfield Construction Company, appellant, vs. Electrical Installation Company, William A. Guthrie, Allis-Chalmers Company et al. Filed October 11th, 1912. File No. 23,381.

UNITED STATES OF AMERICA, SOT.

Office Supreme Court, U. S.

FILED

APR 2 1914

JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

October Term, 1913.

File No. 23321. Term No. 358.

MOORE MANSFIELD CONSTRUCTION COMPANY,

Appellant,

v.

ELECTRICAL INSTALLATION COMPANY ET AL,

Appellees.

BRIEF OF APPELLANT.

A. S. WORTHINGTON,

WILLIAM A. KETCHAM,

Solicitors for Appellant

1. The Impairment of the Obligation of a contract is forbidden to the States by Art. X, Sec. 1, U. S. Constitution, equally and alike whether by means of a change in the construction of statutes or by amendment or repeal of an existing or the passage of a new act: when the appeal is from, or the writ of error is to, a U. S. court.

Gelpcke v. Walker, 1 Wall. 175.

2. The Mechanic's Lien Acts of Indiana not only confer a right, but afford a remedy for the enforcement of a contract for the erection and construction, etc.

Hall et al. v. Bunte, 20 Ind. 304;

Goodbub v. Estate of Hornung, 127 Ind. at 191-2.

3. Remedy for the enforcement of a contract is within the constitutional provision forbidding its impairment; the remedy may be altered or other remedy substituted but it may neither be taken away or lessened.

Edwards v. Kearzey, 96 U. S. 595.

4. a: A contract will not be construed as waiving the right to a mechanic's lien unless there is an express or implied covenant resulting as a necessary implication from the language used, so clearly expressed that a mechanic or material man, without consulting a lawyer, can understand its legal effect.

b: If the contract is fairly and reasonably susceptible of any other construction, it will not be construed as waiving the contractors right to a lien.

Nice v. Walker, 152 Pa. St.;

McLaughlin v. Reinhart, 54 Md. 71;

Poirier v. Desmond, 177 Mass. 201.

5. Neither the contract of February 21 nor that of

June 6, nor the Underwriting agreement of February 21, whether taken separately or construed together constitute a waiver of appellant's right to take and retain a lien.

a: By them appellant bound itself to build the entire railroad, except the electrical part, which, by the contract of June 6, was to be done by the Installation Company, at a cost of several hundred thousand dollars.

b: By the Mechanic's Lien Act it was furnished an absolute and perfect security.

c: If by these contracts the Construction Company waived its right to take a lien, it also waived all right to insist upon payment of its indebtedness as an unsecured claim against the Traction Company for any unpaid amount that might remain due; a construction certainly unreasonable if not impossible.

d: It only agreed to pay and discharge all indebtedness created by or against it in favor of its subcontractors, laborers and material men for work and labor done, materials furnished, etc., that might—if unpaid—constitute the basis of a lien against the property. Appendix C.

6. The Trustee and the holders of the bonds issued thereunder took their securities, with notice and knowledge that the road was yet to be built, and that, unless the claims of those who built the railroad were paid and discharged, the lien of the Trust Deed would be junior and subordinate thereto.

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ANALYSIS OF BRIEF

STATEMENT OF THE CASE, NAMELY:1-7

Order of reference to Master (4)

Master's Report. (4)

Decree in favor of appellant as an unsecured claim and that the mortgage is senior and paramount presents the question:

(a) Whether appellant has a lien.

(b) Whether it is senior and paramount to the lien of the trustee. (5)

By express language of the Mechanic's Lien Act, appellant was entitled to a decree enforcing its lien on the railway property for \$30,406.09, senior and paramount to the lien of trustee (6-7) unless:

(a) A contractor had no right to take a lien or;

(b) Appellant had waived its right by the contracts of February 21st and June 6th. (5-6)

Appellant maintains:

(a) That the contracts did not constitute a waiver; (5)

(b) That the Brennan decision does violate the provisions of Sec. 10 of Art. 1 of the United States Constitution in that it impaired obligation of appellant's contract, (*Gelpcke v. City of Dubuque*, 1 Wall. 175, and cases following it), in as much as it had been the settled law of the state for seventy-five years, by numerous decisions appearing in Appendix "A," p. 69, and this construction was protected by the constitutional provision as affirmed in *Moore-Mansfield, etc., Co. v. Indpls., etc., Co.*, 101 N. E. 296, 179 Ind. 356, is conclusive on the point as to the settled law of the State on the right of contractors to hold a lien. (6-7)

ERRORS RELIED UPON7-9

1. In holding that the decision in the Brennan case, 174 Ind. 1, and cases following it did not impair the obligation of appellant's contract in violation of Sec. 10, Art 1, United States Constitution. (7-8)

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ANALYSIS OF BRIEF.

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2. In decreeing that the lien of the trust deed was senior to the lien of appellant. (8)
3. In decreeing that there was due appellant only \$27,406.09, as an unsecured claim while the decree should have been that there was due appellant \$30,406.09, and the lien thereof was the paramount lien on the railway property and senior to that created by the trust deed. (8)
4. In decreeing the appellant had waived its lien. (8)
5. In not decreeing that appellant had a lien on the railway property senior and paramount to that of all defendants to its cross-bill; the above questions being presented by:
 - (a) The assignment of errors, Printed Rec. 169-70.
 - (b) Paragraphs 3 and 8 of the decree, Printed Rec. 156-7, 159-60.
 - (c) Appendices A B, and C, pages 69-82 of this brief. (8-9)

POINTS AND AUTHORITIES10-16

1. Cross-bill sought to enforce a mechanic's lien on the railway property.
2. The right to the lien was conferred by Secs. 8295-7-8-9, 8300-5-6-7, R. S. 1908 Appendix "B." (10)
3. The provision of the Constitution of Indiana, upon which the Brennan decision was based is attached to Appendix "B" and is as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, but if any subject shall be embraced in the act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Constitution of Ind., Art. 4, Sec. 19. (10)
4. (a) Construction Company's cross-bill specifically challenges the constitutionality of the Mechanic's Lien Act as construed in the Brennan case.
 (b) The Master reports the line of cases decided by the Supreme and Appellate Courts of Indiana from 1834 to 1909, from which it is evident that the construction by the Supreme Court in the Brennan

case impaired the obligation of appellant's contracts. (10-11)

5. The record conclusively shows that appellant was denied the right to a lien. Paragraph IX of the Master's Report shows that there was due and unpaid on estimates \$23,779.62, which with interest to date of decree amounted to \$27,406.09, the Master reported \$3,000.00, as a reasonable solicitor's fee, which under Sec. 8307, R. S. Ind. 1908 should be included in the decree so that if the act had been followed, the decree should have been for \$30,406.09, instead of \$27,406.09. (11-12)
6. Appellant's motion to make decree more specific, Printed Rec. 167—so as to show whether the denial of appellant's lien was based on the constitutional question presented or on the alleged waiver should have been sustained but was denied. (12)
7. From 1834 to 1909, under the Lien Laws of 1834, 1837, 1843, 1852, 1873, by an unbroken line of decisions as set forth in Appendix "A," under substantially similar titles, it had been uniformly held by the Supreme and Appellate Courts of Indiana, that contractors and subcontractors were entitled to take and enforce mechanic's liens and this constituted a rule of property which could not be altered without impairing the obligation of appellant's contract. (12)
8. Where there is a constitutional question in the record, it will be conclusively presumed to have been decided. *Douglass v. County of Pike*, 101 U. S. 680; *Byram v. Board, etc.*, 145 Ind. 242-5. (13)
9. A remedy for the enforcement of a contract right is protected by the constitutional provision against the impairment of the obligation of a contract. *Edwards v. Kearzey*, 96 U. S. 595; *Von Hoffmann v. Quincy*, 4 Wall. 535; *Curran v. Arkansas*, 151 How. 304; *Daniels v. Tearney*, 102 U. S. 419; *Mobile v. Watson*, 116 U. S. 304; *Seibert v. Lewis*, 122 U. S. 284. (13)
10. The right to a mechanic's lien, under the Law of Indiana is a remedial right. *Hall et al. v. Bunte*, 20 Ind. 305; *Goodbub v. Estate of Hornung*, 127 Ind. 192. (13)

11. The inhibition of Sec. 10, Art. 1, against the impairment of the obligation of a contract—when the appeal is from, or the writ of error is to a United States Court—applies as well to an impairment by means of a change of judicial construction as it does to an impairment by means of a legislative enactment; for construction purposes they are interconvertible. *State Bank, etc. v. Knoop*, 16 How. 391; *Ohio v. Debolt*, 16 How. 431; *Gelpcke v. City of Dubuque*, 1 Wall. 206; *Douglass v. County of Pike*, 101 U. S., at 687; *Wade v. Travis County*, 174 U. S. 509; *Loeb v. Columbia, etc., Trustees*, 179 U. S. 192: (13-4)
12. The contracts of Feb. 21st and June 6th, did not operate as a waiver of appellant's lien, but as set forth in Paragraph XIII of the Master's Report, Printed Rec. 138, appellant at all times relied upon its right to take and enforce a mechanic's lien for its indebtedness; the controlling features of these contracts are attached to this brief as Appendix "C." *Nice v. Walker*, 153 Pa. St. 123; *Cresswell, etc., Works. v. O'Brien*, 156 Pa. St. 172; *Zarrs v. Keck*, 40 Neb. 456; *Poirier v. Desmond*, 177 Mass. 201. (14-15)
13. At the time of the execution of the trust deed, May 21, 1906, the work on the railroad had only fairly begun and the contract of June 6th had not yet been executed, the trustee and bondholders were held to the knowledge that it was only a paper road to be ultimately completed by someone and they accepted the security of the bonds and trust deed subject to any unpaid indebtedness in the construction of the road for which liens might be taken. *Farmers, etc., Co. v. Canada, etc., Ry. Co. et al.*, 127 Ind. 250. (16)

ARGUMENT (Continued)17-43

1. The course of legislation and decisions in Indiana with respect to mechanic's liens is set forth in Appendix A, *post*, p. 69 to 72, and the Act of 1883 (Sec. 8295 *et seq.*, R. S. 1908), is set forth in Appendix B, *post*, pp. 73-77, to which is attached the constitutional provision governing the titles of acts. From these it appears that continuously

from 1834 to 1909, it had been recognized by all departments of the government that contractors and subcontractors were accorded the right to a mechanic's lien. February 18, 1909, the Supreme Court of Indiana handed down a decision in Indianapolis, etc., Co. et al. v. Brennan et al., 174 Ind. 1, in which it was held that a contractor was not entitled to take a mechanic's lien. The General Assembly then in session immediately passed, and the Governor approved, an act to place contractors on the same footing that prior to the decision in the Brennan case, they had been placed by the decisions of the courts. Except for the four cases that shortly followed the Brennan case and reported in 172 and 173 Ind., there was no modification or questioning of the Brennan decision until the case of Moore-Mansfield Construction Co. v. Indianapolis, etc., Co., was decided March 19, 1913; 179 Ind. 356, 101 N. E. 296, by which the Brennan case and its construction of the Act of 1883 was completely eliminated. (17-22)

2. The prohibition in the Constitution of the United States applies as well to impairment by a change in judicial construction of existing statutes as it does by impairment through legislative enactments. See authorities under Point 9. (22-33)
3. The distinction as to jurisdiction over cases reaching this court by writ of error to the State Court and a writ of error to or an appeal from a United States Court depends on Secs. 24 and 25 of the Judiciary Act of 1789, and subsequent statutes and is pointed out and made clear in *Gelpcke v. City of Dubuque*, 1 Wall. 206; *Railroad Co. v. Rock*, 4 Wall. 177; *Knox v. Exchange Bank*, 12 Wall. 379; *Central Land Co. v. Laidley*, 159 U. S. 103; *Bacon v. Texas*, 163 U. S. 207, where it was held not that a change in judicial decisions did not impair the obligation of a contract in violation of the constitutional prohibition, but that the language of the judiciary acts was not broad enough to confer appellate jurisdiction on this court while it did confer jurisdiction over such appeals, where judgments of United States Courts came under consideration and the writs of error to state courts were uni-

formly dismissed for lack of jurisdiction under the acts providing for appeal. The opinion in *Natl., etc., Assn. v. Brahan*, 193 U. S. 635; *Muhlker v. N. Y., etc., Co.*, 197 U. S. 544 (dissenting opinion); *Cross Lake, etc. v. Louisiana*, 224 U. S. 632; *Ross v. Oregon*, 227 U. S. 150, properly considered do not constitute an overruling of or a departure from the principle established in *Gelpcke v. City of Dubuque and Railroad Co. v. Rock*, *supra*, as to the distinction as to jurisdiction over two classes of appeals and they still remain the law for this court and of the land (33-46)

4. A constitutional question properly existing in a record will be conclusively presumed to have been decided where the question arises in subsequent cases. *Douglass v. County of Pike*, 101 U. S. 680; *Byram v. Board*, 105 Ind. 242, and it was just as apparent in the cases set out in Appendix A, as it was in the *Brennan* case that contractors and subcontractors were not named in the title of the Acts of 1834, 1837, 1843, 1852 and 1883, and the continued acquiescence in the construction given to those acts by the people, the legislature, the governor and the courts, constitute a rule of property from which the Supreme Court could not depart by judicial construction without impairing the obligation of contracts, which is forbidden by the Constitution of the United States. (46-50)
5. The remedy is a necessary part of a contract and is protected by the constitutional provision against impairing its obligations. *Edwards v. Kearzey*, 96 U. S. 595; *Von Hoffmann v. Quincy*, 4 Wall. 535; *Curran v. Arkansas*, 15 How. 304, and other cases cited under Point 9, p. 13, *supra*. (50-53)

6. THE CLAIM OF WAIVER53-67

This depends upon the construction to be given to the contracts of February 21st and June 6th, with the extract from the Underwriting Agreement of February 21st referred to in the Master's Report. Each of the provisions of these contracts that tends in any way to throw light on this question is made a part of the brief as Appendix C,

post, pp. 78-82. The Master's Report in Paragraph XIII, shows that during the entire time of prosecuting this work appellant relied on its right to take and enforce a mechanic's lien. Nether to this paragraph of the report nor to the evidence on which it was based was there any exception taken. When the contract of February 21st and the Underwriting Agreement were executed (the latter, however, by other parties not including appellant), the road had not been built or even commenced, but was simply a possibility within the language used by the Supreme Court of Indiana in *Farmers, etc., Co. v. Canada*, 127 Ind. 250.

By the Underwriting Agreement nothing was required to be done by the appellant and it was not even a party to it.

Appellant began work on March 26th, and by May had performed work and furnished materials so that it received its first estimate while the trust deed had not yet been executed, so that wholly independent of the rule laid down in *Farmers Loan & Trust Company case*, *supra*, the express language of the Mechanic's Lien Act caused whatever indebtedness might accrue to relate to the time when it began work March 26th, and the question is, did appellant by the language used in either of the contracts of February 21st or June 6th, either expressly or by implication waive its right to take a lien. By the contracts of February 21st, appellant had agreed that it would keep the property clear from any claim or demand created by or against it that might ripen into a lien on the property. It was to do the work, it must necessarily employ laborers, purchase materials, and so become indebted in such a way that unless the claims against it were paid, the holders would have the right to take and enforce liens and these claims would be created by and would be against the Construction Company, as well as the property, and it was binding itself to see that they were discharged—it was not binding itself to discharge the indebtedness due to itself; that was for the Traction Company to do. (57-8)

- By the contract of June 6th, which was between the Traction Company and Installation Company, but was signed by the Construction Company, in as much as by its terms certain of the work which by the contract of February 21st, it had agreed to do, was given to the Installation Company and its assent thereto was necessary. This assent might have been given by a separate instrument but instead was embodied in the contract of June 6th.
- By this contract certain things were to be done by the Installation Company, certain other things by the Traction Company, nothing was to be done by the Construction Company.
- The Traction Company among other things agrees with the Installation Company, that "that portion of the construction work which is to be done by the Moore-Mansfield Construction Company, shall be completed free from any claim of indebtedness, the holdeders of which may * * * be entitled to a lien * * * so that the railway company's issue of first mortgage bonds herein mentioned shall be the only *INDEBTEDNESS* (our italics) against said railway company upon the completion, etc."
- The Traction Company agreed to pay the Installation Company for its work \$560,000 of which \$357,500 was to be paid in cash and \$202,500 in stock and bonds at 45 cents.
- The Construction Company in Paragraph XIII, formally approved the terms of the contract and "agrees that it will do all acts necessary to the carrying out of the agreement, SO FAR AS THE SAME RELATES TO THE MOORE-MANSFIELD CONSTRUCTION COMPANY." (Our italics)
- What does this language require or compel the Construction Company to do. To require it to pay the persons to whom it might become indebted, would be a reasonable and just requirement and that it had agreed to do by its original contract of February 21st. To require it to complete its work without security or payment would be an unreasonable requirement, but the agreement between the Installation Company and the Traction

Company required not only that there were to be no liens but there was to be no indebtedness of any character. The Installation Company was not only to become the owner of \$225,000 of bonds, but it was to become the holder of \$225,000 of stock and as such was interested that there should be no outstanding indebtedness whether secured or unsecured, that might impair the value either of the stock or bonds.

If the contract must be construed as requiring the Construction Company without payment to surrender its right to a lien by the same token it must be construed to require it to surrender without payment all of its claims so as to leave the Traction Company entirely out of debt. Before such extraordinary construction should be placed upon the contract, it ought to be plain, clear and unmistakable. (58-66)

It was within the power and it was the duty of the Traction Company to protect the property from liens or other claim of indebtedness by paying to the Construction Company what was due it, in which case it could take no lien. If the Construction Company had not complied with its contract by paying the indebtedness that it had created, the Traction Company could withhold the money due on estimates and discharge all claims whether created by the Construction Company or against it, that might otherwise ripen into liens but any other construction of the duty devolving upon the Construction Company—than to discharge the liens that had arisen under it—would require it to complete the part of the work that it had agreed to do not only without security but absolutely without payment or claim of payment unless the Traction Company should voluntarily pay—it could not be compelled to.

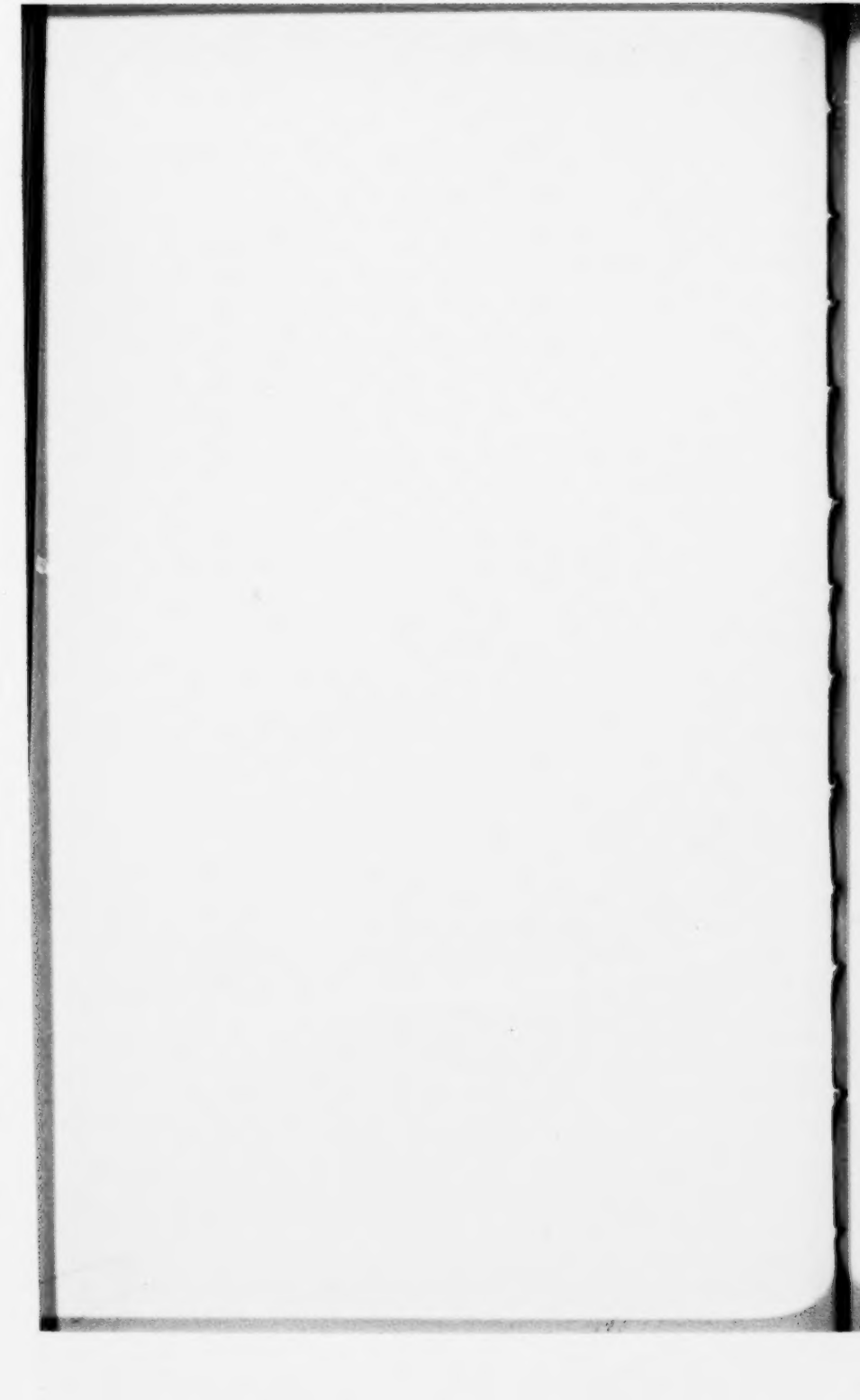
The cases from this State relied upon by defendants to appellant's cross-bill below and probably to be cited here: *Miller et al v. Taggart*, 36 Ind. App. 595; *Swift Co. v. Dolle*, Recvr., 39 Ind. App. 653; *McHenry v. Knickerbacher et al.*, 128 Ind. 77;

Closson v. Billman, 161 Ind. 611, do not even tend to sustain the claim of a waiver in this case.

In *Nice v. Walker*, 153 Pa. St. 123, overruling *Dercheimer v. Mallory* cited and relied upon in *Swift Co. v. Dolle, Recr.*, and which was itself overruled 4 years before it had been cited, it was held that the language in the contract: "The owner will not in any manner be answerable . . . for any of the materials . . . used . . . in . . . completing the . . . work," did not constitute a waiver of the right of the contractor to take a lien and as to the requirements of an alleged waiver said "it should be so plain that every mechanic and material man, though of limited education can understand at a glance and not submit its interpretation to a lawyer and risk its decision against him in the court of last resort."

That the appellant did not so understand it is made certain by the fact that as found in Paragraph XIII in the Master's Report P. R. 138, at all times during the progress of the work it relied upon its right to take and maintain a lien and to this finding and the evidence, upon which it was based there was no exception taken and even the learned counsel for appellant did not so understand it until the stress of the situation compelled them to so claim or demurrers would have been interposed to the cross-bill of appellant which being founded on these contracts specifically tendered the issue of waiver and challenged its presentation by demurrer. (66)

Nice v. Walker, 153 Pa. St. 123 and authorities cited at page 67 of the brief.



UNITED STATES OF AMERICA, SCT.

IN THE

Supreme Court of the United States

October Term, 1913.

MOORE-MANSFIELD CONSTRUCTION
COMPANY,

Appellant,

v.

ELECTRICAL INSTALLATION

COMPANY ET AL.,

Appellees.

File No. 23321.

Term No. 358.

BRIEF OF APPELLANT.

I.

STATEMENT OF THE CASE.

1. (a) The appellee the Electrical Installation Company (hereinafter designated as the Installation Company), filed in the Circuit (now District) Court of the United State within and for the District of Indiana, June 26, 1909, its general creditors' bill against the Indianapolis, Crawfordsville & Western Traction Company (hereinafter designated as the Traction Company).

(Printed Rec. p. 1 to p. 6.)

(b) July 8, 1909, the defendant the Traction Com-

pany asked and was granted leave to file, and pursuant to such leave, filed its cross-bill and a receiver was appointed for the Traction Company.

(Printed Rec. p. 7 to p. 14.)

(c) At the time of the filing of the above bill and since October 12, 1908, the Moore-Mansfield Construction Company (hereinafter designated as the Construction Company), had had pending in the Superior Court of Marion County, its certain action to enforce a mechanic's lien against the Traction Company, the same being designated as Cause No. 76,707, of said Superior Court.

(Printed Rec. p. 21 to p. 22, and p. 27.)

At the time of filing its said complaint in the Superior Court, the Construction Company and Traction Company, being each citizens of the State of Indiana, it was compelled to file its suit in the State Court, the Circuit Court of the United States not then having jurisdiction thereof.

(d) The defendants, the Construction Company and the Marion Trust Company, Trustee (hereinafter designated "trustee"), were made parties defendant to the cross-bill of the Traction Company.

(Printed Rec. p. 23 to p. 48.)

(e) December 6, 1909, the Construction Company filed its answer to the bill, (Printed Rec. pp. 15-17), and the cross-bill of the Traction Company, (Printed Rec. pp. 17-21), and by leave of court filed its cross-bill against all defendants. (Printed Rec. pp. 23-48.)

(f) January 29, 1910, the Trustee by leave of court filed its cross-bill against all the defendants, also its answer to the original and amended bill and also its answer to the cross bill of the Construction Company.

(Printed Rec. p. 48 to p. 86 and p. 86 to p. 99.)

And on February 2nd, the Trustee filed an amendment to its answer to the cross-bill of the Construction Company.

(Printed Rec. pp. 98-9.)

(g) Same day February 2nd, the Installation Company filed its answer to the cross-bill of the Construction Company.

(Printed Rec. p. 99 to p. 106.)

(h) February 4th, the Traction Company filed its answer to the cross-bill of the Construction Company.

(Printed Rec. p. 106 to p. 111.)

(i) February 26th, the Construction Company filed replications to the respective Answers 1 of the Trustee, 2 of the Installation Company, 3 of the Traction Company to its cross-bill.

(Printed Rec. p. 111 to p. 112.)

(j) March 9, Construction Company files answer to cross-bill of Trustee.

(Printed Rec. pp. 113-7.)

(k) March 29, Trustee files replication to answer of Construction Company to its cross-bill.

(Printed Rec. pp. 117-8.)

(l) April 5, stipulation filed between Trustee and Construction Company.

(Printed Rec. p 118.)

2. The cause being at issue upon the bill and the various cross-bills of the Traction, the Installation and Construction Companies, and the Trustee, there was a special

reference to the Standing Master in Chancery to report the facts alone, (Printed Rec. p. 119), and he filed his report on the facts. (Printed Rec. pp. 119 to 150.)

3. January 26, 1912, a decree of foreclosure was entered, (Printed Rec. pp. 150 to 167), by Paragraph 8 of this decree (Printed Rec. pp. 150-160), it was decreed: (a) that there was due the Construction Company at the date of the decree the sum of \$27,406.09, as an unsecured claim against the general funds—if any—applicable to the payment of the general debts of the defendant but not otherwise.

(b) But that it was not entitled to enforce a mechanic's lien against any of the property of the Traction Company, and that no such lien exists.

4. By Paragraph 3 of the decree (Printed Rec. pp. 156-7), it was decreed that the mortgage or trust deed to the Trustee was senior and paramount to the lien of all the defendants, including the Construction Company and that the mortgage should be foreclosed; the railway property sold to pay the amount due on the mortgage bonds, viz: the sum of \$1,752,907.78 and costs.

5. The precise controversy presented by the record is:

(a) Has the Construction Company a valid, subsisting, enforceable mechanic's lien under the Laws of Indiana upon the railway property of the Traction Company?

(b) Is such lien senior and paramount to the lien of the trust deed or mortgage given to secure the outstanding bonds?

By this appeal and the record the appellant, the Construction Company, affirms both propositions to be true.

The appellee, the Trust Company, denies each proposition to be true; the other appellees are not in fact concerned in either proposition.

The court by its decree as stated, *supra*, denied the first proposition and having so decreed, necessarily denied the second.

6. If the Construction Company in fact had no lien, as decreed by the court, that question would at once have been properly and simply presented by either or any of the defendants to the cross-bill of the Construction Company by a demurrer thereto. No such demurrer was ever filed so that the question of the validity and priority of the lien of the Construction Company's answer is upon and is presented by the Report of the Standing Master in Chancery as to the facts and the decree of the court thereon, there being no exceptions filed to the Report of the Master.

7. By the precise terms of the Mechanic's Lien Act of Indiana of 1883, as amended, appellant under Sections 8305-6-7, Rev. St. 1908 (see Appendix "B"), under the facts, found and reported by the Standing Master, was entitled to take, retain and enforce its lien for the amount reported by the master as decreed by the court in Paragraph No. 8, of the decree, *supra*, in the amount of \$27,406.09, and in addition a solicitor's fee of \$3,000.00—see Paragraph IX, of the Masters Report (Printed Rec. p. 132 to p. 134, or a total of \$30,406.09, senior and paramount to the lien of the mortgage to the Trustee unless:

(a) It was the law of Indiana that neither a contractor or subcontractor had the right under such act

to take and enforce a lien upon such property, as held by the Supreme Court in the case of *Indianapolis Northern Traction Company et al. v. Brennan et al.*, 174 Ind. 1, and the several cases following it in 172 Ind., at page 352 and in 173 Ind., at pages 260, 535 and 717, or,

(b) The Construction Company by force of the language used in the contracts of February 21 and June 6, 1906, and the Underwriting Agreement of February 21, 1906, see Paragraphs IV, VII and VIII of the Masters Report (Printed Rec. p. 121 to pp. 124-132 and Exhibit A with the cross-bill of the Construction Company (Printed Rec. p. 36 to pp. 39-45), had either expressly or by implication waived its right to take, hold and enforce a mechanic's lien even although under the law it was otherwise entitled to such lien.

It is the contention of the appellant:

(a) That the contracts referred to, *supra*, did not either separately or collectively operate as a waiver of its right to take, maintain and enforce a mechanic's lien.

(b) That the decision of the Supreme Court of Indiana in the Brennan case, *supra*, holding that a contractor or subcontractor is not entitled under the law to take and hold a mechanic's lien, is itself unconstitutional as impairing the obligation of a contract in violation of the Constitution of the United States within the meaning of *Gelpcke v. City of Dubuque*, 1 Wall. 175, and cases following it as hereinafter at page 14, more fully set forth; that at the time of executing the contracts and entering upon the work of constructing said railway, it had for seventy-five years been the settled law of this state that a contractor was entitled to take and enforce a mechanic's lien as appears by the long line of decisions set out in Appendix "A" and hereinafter at pages 12, 17 and 22 of this

brief, referred to and discussed and appellant was by such decisions and such settled law of the state protected in its contract right to take and enforce a mechanic's lien that might not be impaired by the change in the construction of the statute by the Supreme Court of the state in the Brennan case, and that the correctness of its position and claim are fully established by the subsequent decision of the Supreme Court of the state in the case of *Moore-Mansfield Construction v. Indianapolis, Newcastle, etc., Co.*, 101 N. E. 296, 179 Ind. 356.

II.

SPECIFICATION OF ERRORS RELIED UPON.

The court below erred:

1. In decreeing that the opinion of the Supreme Court of Indiana in *Indianapolis, Northern Traction Company et al. v. Brennan et al.*, 174 Ind. 1, and the cases reported in 172 and 173 Ind., following it in which it was held that under the Mechanic's Lien Law of 1883, Sec. 8295, *et seq.*, Rev. St. of Indiana of 1908, Appendix "B," neither contractors nor subcontractors were entitled to take, maintain or enforce a mechanic's lien, and this notwithstanding it had prior thereto, by an unbroken series of decisions covering a period of seventy-five years, been the settled law of the state as shown by decisions of such court in Appendix "A," that contractors and subcontractors equally and alike with laborers and materialmen were entitled to take, hold, maintain and enforce a mechanic's lien did not constitute an impairment of the obligation of the contract of appellant in violation of Section X of Article 1 of the Constitution of the United

States, whereas the court below should have held and decreed that such opinion constituted an impairment of appellant's contracts of February 21 and June 6, 1906, with the Traction Company and that, notwithstanding such decision of the Supreme Court of Indiana in said cases this appellant had valid, subsisting and enforceable contracts against the railway property, the lien of which was senior and paramount to the lien of the Trustee.

2. In decreeing that the lien of the trust deed executed by the Traction Company to the Trustees, to secure the bonds secured thereby, constituted a lien upon the railway property of the Traction Company, senior and paramount to the lien of the Construction Company, whereas the court should have decreed that the Construction Company had a valid and subsisting lien upon said railway property, which was senior and paramount to the lien of the Trustee.

3. In adjudging and decreeing that the Construction Company held a claim for only \$27,406.09, whereas the court should have decreed that there was due the Construction Company the sum of \$30,406.09, and that the same constituted a first lien upon the railway property of the Traction Company.

4. In adjudging and decreeing that the Construction Company had waived its right to take, hold, maintain and enforce a mechanic's lien upon said railway property for the work and labor done and performed and the materials furnished by it in the construction of said railroad, whereas the court should have decreed that the Construction Company had not waived, but still held and was entitled to enforce its said lien.

5. In not adjudging and decreeing that the appellant had a valid and subsisting lien upon the railway property

of the Traction Company, which was senior and paramount to the lien of either or any of the parties to the record.

All of which will more fully appear by reference:

(a) To the Assignment of Errors appearing in the Printed Record at pp. 169-170.

(b) To Paragraphs 3 and 8 of the decree at pp. 156-7 and pp. 159-160.

(c) To Appendices A and B of this brief.

III.

ARGUMENT.

(a) PRELIMINARY—POINTS AND AUTHORITIES.

1. The cross-bill of the Construction Company sought to enforce a mechanic's lien upon the railway property of the Traction Company.

(See Printed Rec. p. 23 to p. 47.)

2. The right to take and enforce such lien was conferred by the Act of 1883, as amended, being Section 8295, *et seq.*, Rev. St. of Ind. 1908, and more especially Sections 8305-6-7, 8295-7-8-9 and 8300; each of which is printed and attached hereto as Appendix "B."

3. The constitutional provision considered in the Brennan and succeeding cases is as follows:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in the act which shall not be expressed in the title such act shall be void only as to so much thereof as shall not be expressed in the title."

Constitution of Indiana Art. IV, Sec. 19.

4. (a) The cross-bill of the Construction Company (Printed Rec. p. 23 to p. 47, specifically and in terms challenges the constitutionality of the Mechanic's Lien Act under the construction thereof by the Supreme Court of Indiana in the Brennan case.

(b) The Masters Report in Paragraph XII (Printed Rec. p. 135 to p. 137), specifically finds the facts in regard to the line of decisions that had pre-

vailed in the state from 1834 to 1909, upon which it is apparent that by the construction adopted by the Supreme Court in the Brennan case the value of appellants contracts of February 21 and June 6, 1906, with respect to its right to take, hold and enforce a mechanic's lien upon the railway property was destroyed, the obligation of its contracts was impaired and so this appeal properly presents the constitutional question, the eighth paragraph of the decree of foreclosure (Printed Rec. p. 160), specifically and in terms holding that this appellant has no such lien and the third paragraph of the decree (Printed Rec. pp. 159-160), decreeing that the lien of the deed of trust to the extent of \$1,752,907.78, was senior and paramount to the lien of all the defendants to the Trustee's cross-bill including this appellant.

5. It appears by necessary implication that appellant was denied a right to a lien for that it appears by Paragraph 9, of the Masters Report (Printed Rec. pp. 132-4,) that there was due and unpaid on the several estimates made in Construction Company's favor the sum of \$23,779.62, which several estimates with interest to the date of the decree amounted to the sum of \$27,406.09, at the date of the decree, but it also appeared in said Masters Report that a reasonable solicitor's fee was \$3,000.00, and by Sec. 8308 Rev. St. 1908; Sec. 14 of Mechanic's Lien Act of 1883—see Appendix "B"—the judgment was required to include the reasonable attorney's fee. If the act had been complied with the amount decreed to appellant would have been \$30,406.09, in lieu of \$27,406.09, as decreed and it is therefore absolutely certain that the court below followed the Brennan case and refused to hold that the act as construed in the Brennan case was unconstitutional as impairing the ob-

ligation of appellants contracts in violation of the Constitution of the United States.

6. Lest there might be supposed to be some doubt as to whether the decree was based, (a) upon the constitutional question and that therefore the appeal would lie to this court or whether, (b) it was based on the alleged claim of waiver by appellant of the right to take and retain a mechanic's lien, in which case the appeal would (probably) lie to the Circuit Court of Appeals, appellant at the time of entering the decree filed its motion (Printed Rec. pp. 167-8), to make the decree more specific and definite in that respect, which motion was, however, denied by the court and it is evident from the record that whatever may have been the view of the court below on the question of the alleged waiver by appellant of its right to take a lien, the court refused to decree that the change in the construction of the Mechanic's Lien Act of 1883 by the Supreme Court of Indiana in the Brennan case constituted an impairment of the obligation of appellants contracts in violation of the Constitution of the United States.

7. From 1834 to 1909, under the several Mechanics' Lien Laws of Indiana 1834, 1843, 1852, 1873 and 1883, uniformly, by an unbroken line of decisions set forth *in extenso* in Appendix "A," under substantially similar titles, contractors and subcontractors were held to be entitled to the benefits of the Mechanic's Lien Laws of the State of Indiana equally and alike with laborers and material-men, and such holdings constituted a rule of property that could not be altered without impairing the obligation of the contract under which the appellant furnished materials and performed labor in the erection and construction of the Traction Company's line of railway.

8. Where a constitutional question is in the record, it will be conclusively presumed to have been decided although no specific language on the subject has been used in the opinion.

Douglas v. County of Pike, 101 U. S., at p. 680;

Byram v. Bd. of Comrs., 145 Ind. 242-5.

9. The remedy for the enforcement of a contract is a substantial part of its obligation; it may be modified, added to or other remedies substituted in lieu of the old one, but it cannot be repealed or materially lessened without violating the constitutional provision safeguarding the obligation of a contract.

Edwards v. Kearzey, 96 U. S. 595;

Von Hoffman v. Quincy, 4 Wall. 535;

Planter v. Shark, 6 How. 301;

Curran v. Arkansas, 15 How. 304;

McCracken v. Hayward, 2 How. 608;

Bronson v. Kinzie et al., 1 How. 311;

Seibert v. Lewis, 122 U. S. 294;

Mobile v. Watson, 116 U. S. 304;

Daniels v. Tearney, 102 U. S. 419;

Oshkosh, etc. Co. v. Oshkosh, 187 U. S. 437;

The Queen, 93 Fed. 834;

Fisher v. Green, 31 N. E. 176; 142 Ill. 80;

Phinney v. Phinney, 17 Atl. 409; 81 Me. 450.

10. The right under the law of Indiana to take and enforce a mechanic's lien is a remedial right.

Hall et al. v. Bunte, 20 Ind., at 305;

Goodbub v. Estate of Hornung, 127 Ind. 181, at p. 192;

See also *Bear Lake, etc., Co. v. Garland*, 164 U. S. 1.

11. The inhibition of Sec. 10, Art. 1, of the U. S. Con-

stitution, against the impairment of the obligation of a contract applies as well to an impairment by means of a change of judicial construction—where the appeal is from or the writ of error is to a U. S. Court—as it does by means of an impairment by legislative enactment; for construction purposes they are interconvertible.

State Bank, etc. v. Knoop, 16 How. 391-2;
Ohio v. Debolt, 16 How. 431;
Gelpcke v. City of Dubuque, 1 Wall, 206;
Havemeyer v. Iowa Co., 3 Wall. 303;
City v. Lamson, 9 Wall, 486;
Chicago v. Sheldon, 9 Wall, 50;
Douglas v. County of Pike, 101 U. S. at 680;
Taylor v. Ypsilanti, 105 U. S. 71;
Louisiana v. Pillsburg, 105 U. S. 278;
County of Ralls v. Douglas, 105 U. S. 728;
New Orleans, etc., Co. v. Louisiana, etc., Co.,
 115 U. S. 672;
Shapleigh v. San Angelo, 167 U. S. 657;
Wade v. Travis County, 174 U. S. 509;
Los Angeles v. Los Angeles, etc., Co., 177 U. S.
 575;
Loeb v. Columbia, etc., Trustees, 179 U. S. 492;
Union Bank v. Board, etc., 90 Fed. 9-12;
Great Southern, etc., Co. v. Jones, 116 Fed. 793;
U. S. ex rel., etc. v. Justices, 5 Dillon 184, 315,
 418;
Hasket et al. v. Macey et al., 134 Ind. 190-1;
Stephenson et al. v. Boody, 139 Ind. 60;
Myers et al. v. Boyd, 144 Ind. 496-9.

12. Neither

(a) The contract of February 21, 1906, by and between

the Construction Company and the Traction Company. (Printed Rec. pp. 36 to 39 and Appendix C.)

(b) The extract from the Underwriting Agreement of February 21, 1906, between the Traction Company and divers and sundry undisclosed parties not including, however, the Construction Company (Printed Rec. p. 121), nor;

(c) The contract of June 6, 1906, by and between the Installation Company and the Traction Company, but assented to by the Construction Company (Printed Rec. p. 39 to p. 45), either separately or jointly operated as a waiver by the Construction Company of its right to take, hold and enforce its mechanic's lien, but as stated in Paragraph 13 of the Masters Report (Printed Rec. p. 138), the Construction Company at all times relied upon its right to take and enforce its lien for the indebtedness that might become due it under its contracts for work and labor done and materials furnished that might not be paid for and that the purpose and effect and the only purpose and effect of its stipulations was to agree that it would itself pay all the indebtedness that it might contract in the doing of its work and thereby prevent anyone that had worked for or under it or had furnished to it materials from encumbering the property by attempting to take liens for the amount that might become due to them by reason of the failure of the Construction Company to pay the indebtedness that it had incurred in doing the work and furnishing the materials that it had agreed to do and furnish.

For the convenience of the court we annex hereto as Appendix "C" extracts from each of the three contracts that may be supposed to bear directly and remotely on the question of the alleged waiver.

27 Cyc. 263;

Boisot's Mechanic's Liens, Sec. 746, and authorities cited;

Nice v. Walker, 153 Pa. St. 123; 27 Atl. 131;

Cresswell, etc., Works v. O'Brien, 156 Pa. St. 172; 28 Atl. 364;

Gordon v. Norton, 186 Pa. St. 168-174; 40 Atl. 312;

Zarrs v. Keck, 40 Neb. 456;

Poirier v. Dismond, 58 N. E. 684; 177 Mass. 201;

Evans v. Grogan, 153 Pa. St. 121; 25 Atl. 804;

Howarth v. Chester, etc., Church, 162 Pa. St. 17; 20 Atl. 291:

13. At the time of the execution of the mortgage or trust deed, May 21, 1906, the work on the railroad had only fairly been started and the contract of June 6, 1906, had not been executed.

The Trustee knew and the bond holders were held to the knowledge that it was only a paper road to be ultimately completed by someone. Under these circumstances they must be held to have accepted the security of the bonds and mortgage subject to any unpaid indebtedness in the construction of the road, for which liens might thereafter be filed.

Farmers, etc., Co. v. The Canada, etc., Ry. Co. et al., 127 Ind. 250.

IV.

(b.) ARGUMENT (*Continued*)

1. THE COURSE OF LEGISLATION IN INDIANA AND DECISIONS THEREON WITH RESPECT TO MECHANIC'S LIENS.

For three quarters of a century—from 1834 to 1909 (inclusive)—it had been the settled law of Indiana by legislative enactments and an unbroken line of decisions that contractors and subcontractors who furnished the men and material and paid for them in the erection of buildings equally and alike with the laborers and material-men had a lien upon the product of their work and expenditures.

We annex to this brief as Appendix A, a detailed statement of the titles of the respective acts on the subject and under each the cases that arose and were decided by the Supreme and Appellate Courts thereunder.

The master in Paragraph 12 (Printed Rec. pp. 135-7), gives a list of cases in some of which the lien claimant was neither a contractor nor subcontractor, such cases are not illuminative or instructive on any question that arises on this record.

(a) The first act on the subject was that of 1834 under which there was but one case in the Supreme Court and it is not entirely certain from the opinion in the case whether it was the case of a contractor or laborer—it might be either.

(b) The second act on the subject was that of 1838 under which there arose one case.

(c) The next act was that embraced in the Revision of 1843 under which there are four cases reported.

It is proper to remark in this connection that until the adoption of the constitution of 1850, there was no specific requirement as to what the title of the act should

contain but it has always been the law that the title, if not a useful, is an ornamental appendage to an act and it would be quite difficult, if not impossible, to find an act in this state or elsewhere that did not have, as a necessary part, a title.

(d) After the adoption of the constitution of 1850 the act of 1852—the practice act—was enacted which contained in its belly as Art. 36, the Mechanic's Lien Act and, which although approved on the 18th of June, 1852, did not go into force until the 6th day of May, 1853, so that whatever liens, if any—were enforced prior to that latter date were enforced under the provisions of the Revision of 1843.

Under this act there arose twenty-three cases.

(e) From the Revision of 1881, Art. 36 in the Revision of 1852 was omitted from the practice act but the entire of Art. 36 was published by the authorized revisers as Sections 5293 to 5300 referring to the appropriate sections in the Revised Statutes of 1852.

(f) In the Acts of 1873, p. 187, Revised Statutes of 1881, Secs. 5301-3, a lien act was passed covering the case of those who furnished materials in the erection and construction of railways; under this act but one decision seems to have been reported.

(g) At the session of the General Assembly succeeding the one at which the Revision of 1881 was approved the Act of March 6, 1883, being Sec. 8295 to 8307 (inclusive) was enacted in which the railway lien act of 1873 was incorporated as secs. 12-14, 8305-7 Revised Statutes of 1908, A number of the sections of this act of 1823 were amended from that time to 1899 but in no respect material to the questions presented by this record and this continued to be the settled law of the State until Feb. 18, 1909. Under

this act thirty cases involving the rights of contractors or subcontractors arose and were passed upon by the Supreme and Appellate Courts as shown in Appendix A. So that under various acts from 1834, to 1883, (inclusive) fifty-nine cases, involving the rights of contractors and subcontractors found their way to the Supreme and Appellate Courts and it was never discovered until the decision in the Brennan case that none of these acts enured to the benefit of the contractor and subcontractor.

How many cases there were in the *nisi prius* courts involving the rights of contractors and subcontractors that did not find their way to the Supreme or Appellate Courts the record does not disclose nor as we suppose would it be possible to approximately ascertain that number in the ninety-two counties of the state but it is reasonably certain that in these 75 years they were numbered by the hundreds if not by the thousands.

The whole of the act so far as throwing any light on the question presented by the record is annexed hereto as Appendix B.

On the 18th day of February, 1909, in the case of *Indianapolis Northern Traction Company v. Brennan et al.*, 174 Ind. 1, the entire course of the previous decisions was reversed and it was held that notwithstanding the precise language of the act itself, contractors and subcontractors were not entitled to the benefits of the lien act and this holding was shortly followed in the cases of *Korbly v. Loomis*, 172 Ind. 352; *Fleming v. Greener*, 173 Ind. 260; *Cleveland etc., Ry. Co. v. De Frees*, 173 Ind. 717, and shortly thereafter by the decision in *Ward v. Yarnelle*, 173 Ind. 535, in which it held that inasmuch as a corporation could not perform labor with its hands having "_____ and no soul to

damn" could not enforce a lien notwithstanding in numerous cases decided by that and preceding courts such corporations were entitled to the benefit of the act. There is no decision as to what the right would be in case the corporation had furnished materials and so far as the decisions are concerned that question was left undisturbed.

At this time the General Assembly of the state was in session being near to its close, the 6th day of March being the last day on which a bill might be passed and sent to the governor for his approval unless he should waive the question of time.

The General Assembly recognizing that the lien system of the state rested upon the foundation that went back of the adoption of the constitution of 1850, and that it had been the uniform and should be the continued policy of the state to provide for contractors and subcontractors, immediately passed an act intended to make provision for the omission as pointed out by the Supreme court. It did so in such hot haste that when the bill came to the governor for his approval, himself a lawyer, he at once recognized that this bill contained the same infirmity on account of which the Brennan decision had been made, and returned the bill to the General Assembly disapproved and thereupon there was introduced into the General Assembly the bill by a corrected title which was passed and approved on the 6th day of March, 1909, Acts of 1909 p. 295, so that from the time of the handing down of the opinion in the Brennan case until the new bill became a law there intervened only 16 days including Sundays.

The opinion in the Brennan case was, considered from a legal standpoint, something of a curiosity. It did not hold that the act of 1883 so far as it affected contrac-

tors or subcontractors was unconstitutional but that inasmuch as it would be unconstitutional if it resulted in giving to contractors or subcontractors the right to a lien by construction, construing the act with the title, the court held that there was no provision in the act for the benefit of contractors or subcontractors and thus stood the law so far as Supreme court decisions could establish it until the 27th day of March, 1913. Save as above set out there were no decisions on the subject of the rights of contractors or subcontractors until the decision of the case of the *Moore-Mansfield Construction Company et al., v. Indianapolis, etc. Co.*, 101 N. E. 296, 179 Ind. 356.

In the latter case the constitutionality of the act as construed in the Brennan case was challenged by the appellant, Paragraph 2, Col. 1, p. 300, but there was no decision by the Supreme Court on that question, it being the general policy of the Supreme Court of Indiana as of other courts to decide cases upon other questions than the constitutional questions.

The court did however, eviscerate the decision in the Brennan case and the cases following it in the language contained in No. 14, the conclusion of the opinion, at p. 391, of 179th Ind.:

"We are urged, for reasons stated, to the conclusion that the ruling in the Brennan case was erroneous, and that the error is clearly manifested. Are the reasons for overruling the former decisions sufficiently urgent to justify such action? It appears that appellants have relied on the protection of the mechanic's lien law, which was practically interpreted by people, legislatures, and courts for at least seventy years, to secure them from the loss of the value of labor and materials furnished appellee. If the doctrine announced in the Brennan case is to be upheld, we must see the value of appellee's road enhanced to the extent of appellant's labor and materials furnished, all with-

out recompense. And while the legislature has restored the law to its former supposed efficacy, the adherence to the doctrine declared in the Brennan case imposed on this state a rule of construction so strict as to seriously embarrass future legislation.

On the whole, we believe the reasons are sufficiently urgent as to fairly require the overruling of those decisions, and therefore the cases of *Indianapolis, etc., Traction Company v. Brennan, supra*, and the subsequently determined cases following it, in so far as they held that the Act of March 6, 1883, as amended does not include contractors, subcontractors, and corporations among those entitled to liens thereunder, are overruled."

It is therefore, we submit, entirely proper to say that the rule announced in the Brennan case was not only unwise, improvident and properly overruled, but that it was itself unconstitutional within the rule discussed immediately following this paragraph as depriving the appellant of a vested right in violation of the provision of the Constitution of the United States forbidding the impairment of the obligation of a contract under Sec. 10 of Art. 1 of the Constitution of the United States.

2. THE INHIBITION AGAINST IMPAIRMENT OF THE OBLIGATION OF A CONTRACT, APPLIES AS WELL TO SUCH IMPAIRMENT BY MEANS OF A CHANGE OF JUDICIAL CONSTRUCTION, AS IT DOES BY MEANS OF AN IMPAIRMENT BY LEGISLATIVE ENACTMENT; FOR CONSTRUCTION PURPOSES THEY ARE INTER-CONVERTIBLE.

See authorities cited under Point 11, *supra*.

Obviously, this must be so. The obligation of a contract may be impaired precisely the same by a change in judicial construction as by a change in legislative enactment. The effect on the rights of a party is precisely the same in the one case as in the other. What a law

means or requires is what the court says it means or requires. The legislature may pass an act intended to accomplish a particular purpose; it runs the gauntlet of judicial construction. In construing a statute the cardinal rule for the court is to ascertain what was the intention and purpose of the legislature in its enactment, and when so ascertained that is its purpose and effect—whether the legislature intended or not to accomplish that particular purpose or effect. For example in the *Slaughter House* cases, 16 Wall. 36, Mr. Justice Miller, in discussing the provision of the 14th amendment, "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws," says, at p. 81: "We doubt very much whether any action of any state not directed by way of discrimination against the negroes as a class or on account of their race will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other." This was the language of one of the greatest jurists of his time and one of the most profound constitutional lawyers that ever adorned the Supreme Court of the United States, pronounced within a few years of the close of the War of the Rebellion, and still less of the adoption of the amendment, and it seemed then to be true. When we consider, however, the long line of cases wherein distressed corporations and individuals have sought to make of the Supreme Court of the United States a "Harbor of Refuge," we readily see how short his vision was, and it has come to mean not what the court then thought it meant, but what by judicial construction and application it has since been held to mean, and this although the words have ever since remained identically the same.

It has come to mean more because the courts have said it means more, and what the courts say an act or a constitution means or requires, it does mean or require. It would, we submit, be a "sticking in the bark," to say that a law as passed may not impair the obligation of a contract, but as *construed* it may.

We submit, therefore, that the rule is that the obligation of a contract may no more be impaired by a change in judicial construction than by a change in legislative enactment.

In *Ohio, etc., Co. v. Debolt*, 16 How. 416, Chief Justice Taney says, at pp. 431-2 (21 Curtis 234-5) :

"This brings me to the question more immediately before the court. Did the Constitution of Ohio authorize its legislature by contract to exempt this company from its equal share of the public burdens during the continuance of its charter? The Supreme Court of Ohio in the case before us has decided that it did not, but this charter was granted while the Constitution of 1802 was in force, and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears from the acts of the legislature that the power was repeatedly exercised while that constitution was in force and acquiesced in by the people of the state. It was directly and distinctly sanctioned by the Supreme Court of the state in the case of *The State v. Commercial Bank of Cincinnati*, 7 Ohio 125.

"And when the constitution of a state for nearly half a century has received one uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, I think it must be regarded as the true one. It is true that this court always follows the decisions of the state courts in the construction of their own constitution and laws, but where those decisions are in conflict, this court must determine between them, and certainly a construction acted on as undisputed

for nearly fifty years by every department of the government and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court upon the soundest principles of justice is bound to adopt the construction it received from the state authorities at the time the contract was made. * * * Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here, and the sound and true rule is that if the contract when made was valid by the laws of the state as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts altering the construction of the law."

In *Gelpcke v. The City of Dubuque*, 1 Wall. 175, Mr. Justice Swayne, after quoting with approval the language of the Chief Justice *supra*, said at p. 206:

"The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court, it rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case. * * * We shall never immolate truth, justice and the law because a state tribunal has erected the altar and decreed the sacrifice."

In *Havemeyer v. Iowa County*, 3 Wall. 294, it was said by Mr. Justice Swayne, at p. 303, referring to certain cases:

"But being long posterior to the time when the securities were issued, they can have no effect upon our decision and may be laid out of view. We can only look to the condition of things which subsisted when they were sold. That brings them within the rule laid down by this court in *Gelpcke v. The City of Dubuque*. In that case it was held that if the contract when made was valid by the constitution and laws of the state as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation and we feel no disposition to depart from it."

In *Olcott v. The Supervisors, etc.*, 16 Wall. 678, it was said by Mr. Justice Strong, at p. 690:

"There is another consideration that leads directly to the same conclusion. This court has always ruled that if a contract, when made, was valid under the constitution and laws of a state as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

In *Douglas v. County of Pike*, 101 U. S. 677, it was said by Chief Justice Waite, at p. 687:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amend-

ment, that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction the construction becomes so far as contract rights acquired under it are concerned as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. So far as this case is concerned we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully not only the right of a state court, but its duty, to change its decision whenever in its judgment the necessity arises; it may do this for new reasons, or because of a change of an opinion in respect to old ones, and ordinarily we will follow them except so far as they affect rights vested before the change was made. The rules which properly govern courts in respect to their past adjudications are well expressed in *Boyd v. Alabama*, 94 U. S. 645, where, we spoke through Mr. Justice Field * * * the new decisions would be binding in respect to all issues of bonds after they were made. But we cannot give them a retroactive effect without impairing the obligation of contracts long before they have been entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. We always regret to find ourselves in conflict with the courts of the states in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction."

In *Taylor v. Ypsilanti*, 105 U. S. 60, it was said by Mr. Justice Harlan, at p. 71:

"The position taken by counsel for the city is that the established, settled construction given by the highest court of a state of the laws and constitution of that state must be deemed in all cases binding upon the courts of the Union. * * *

This proposition, in the general terms in which it is announced, is undoubtedly supported by the language of some of the opinions which have emanated from this court. But all along through the reports of our decisions are to be found adjudications in which upon the fullest consideration it has been held to be the duty of the Federal courts in all cases within their jurisdiction depending upon local law to administer that law so far as it affects contract obligations and rights as it was judicially declared to be by the highest court of the state at the time such obligations were incurred or such rights accrued, and this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the state courts give to their own constitution and laws." Quoting with approval the language of Chief Justice Taney, quoted *supra*, * * * at p. 71, "for these reasons * * * we are of the opinion that the rights of the plaintiff as the owner of bonds issued under a statute which when passed was valid by the laws of Michigan as declared and acted upon by the several departments of its government, are not affected by decisions of the Supreme Court of the state rendered after the railroad company to whose rights the plaintiff succeeded had earned the bonds under contract with the city made in conformity with the statutes."

In *Shapley v. San Angelo*, 167 U. S. 646, it was said, at p. 657:

"The provisions of this act might be reasonably interpreted as consistent with the principles heretofore stated and as providing a method of enforcing the rights of creditors. But it appears that the Supreme Court of Texas has construed the act as requiring a vote of the tax-paying voters in favor of assuming the debt before the new corporation can be held for it. (Authorities.) If this, indeed be so—and it is difficult to reconcile such a view

with those previously expressed by that court—then it would follow as we think that said act so construed must be regarded as respects prior cases as an act impairing the obligations of existing contracts. If the law before the passage of the act of 1891 was that by a voluntary reincorporation and a taking over of the property rights, of the old corporation the existing obligations devolved upon the new corporation it would plainly not be a legitimate exercise of legislative power as affecting such prior obligations to substitute an obligation contingent upon a vote of the taxpayers. When the bonds in question were issued and became the property of the plaintiff he was entitled not merely to the contract of payment expressed in the bonds, but to the remedies implied by existing laws. (Citing authorities.) It is unnecessary to restate what is fully expressed in those cases.”

In *Wade v. Travis County*, 174 U. S. 499, it was said by Mr. Justice Brown, at p. 508:

“But assuming that the later case was intended to overrule the prior ones and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them. (Citing authorities.) If there be any inconsistency in the opinions of these courts the general rule is that we follow the latest, settled adjudications in preference to the earlier ones * * * .” And at page 509: “An exception has been admitted to this rule, where upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute other contracts have been made or bonds issued under the same statutes before the prior cases were overruled. Such contracts and bonds have been held to be valid upon the principle that the holders upon purchasing such bonds the parties to such contracts were entitled to

rely upon the prior decisions as settling the law of the state. To have held otherwise would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security."

In *Los Angeles v. Los Angeles, etc., Co.*, 177 U. S. 558, it was said at p. 575:

"It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the state that the constitution of the state permitted a grant of special franchises to persons and corporations and permitted the latter to receive assignments of them from such persons or grants of them directly from the Legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions (citing authorities).

In *Loeb v. Columbia Tp. Trustees*, 179 U. S., it was said by Mr. Justice Harlan, at p. 492:

"What, under these circumstances was the duty of the Circuit Court? That court, speaking by Judge Thompson, held that its duty was to enforce the provisions of the Constitution of Ohio as interpreted by the Supreme Court of that state at the time the bonds were issued, and not permit the contrary decisions made after the bonds were issued to have a retroactive effect. This was in accordance with the long established doctrine of this court to the effect that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent

legislation. Our decisions to that effect are so numerous that any further discussion of the question is unnecessary and we need only cite some of the adjudged cases (citing authorities)."

In *Haskett et al. v. Marey et al.*, 134 Ind., at pp. 190-1, it was said by Judge Coffey:

"Courts of last resort are often constrained to change their rulings on questions of the highest importance. When this is done the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is and always has been as expounded in the last decision. But to this general rule there is a well established and well understood exception. This exception is that 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of legislative enactment' (citing some of the authorities from which we have quoted *supra*) * * *."

Sutherland on Statutory Construction, Sec. 319, says:

"A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards, it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligation of existing contracts made on the faith of the earlier adjudications."

In *Meyers et al. v. Boyd et al.*, 144 Ind. 496, it was said, at p. 498:

"The appellees claimed title to the land through *mesne* conveyances by virtue of the administrator's deed so given. At the time the deed was made and for more than 22 years prior thereto, it was held

by the uniform decisions of this court * * * that * * * a second or subsequent wife having no children by her husband, took a life estate only in his lands, where he left upon his death children alive by a former wife. At the May term, 1881, this court in the case of *Utterback v. Terhune*, 75 Ind. 363, whether wisely or otherwise, changed the interpretation theretofore given to the said statutes, and since the latter case the holding of the court has been that * * * a second or subsequent childless widow took a fee simple in her husband's lands, when he died leaving children alive by a former wife, such lands to go to said children on her death. But in *Haskett v. Maxey* * * * it was held that the construction placed by the court upon the foregoing statute at the time a contract thereunder was entered into must determine the rights of the parties, and that a subsequent change in the construction could not operate retroactively so as to impair the obligation of the contract (quoting from authorities). * * * In the case under consideration the court trying the case, the administrator, the widow, the heirs, the purchaser at public sale, all understood and acted in accordance with the interpretation then, and continuously for years previous thereto given to the statute by the court of last resort. * * * We think the interpretation so made and so understood by all the parties should still prevail as to the sale thus made."

In *Center, etc., Tp. v. State ex rel., etc.*, 150 Ind. 168, it was said by Judge Jordan, at p. 173:

"The decisions of a court of last resort, the authorities assert, are not the law, but are only the evidence or exposition of what the court construes the law to be. And in overruling a former decision by a subsequent one, the court does not declare the one overruled to be bad law, but that it never was the law and the court was therefore simply mistaken in regard to the law in its former decision. The first decision upon the point on which it is over-

ruled is wholly obliterated and the law as therein construed or declared must be considered as though it never existed and that the law always has been as expounded by the last decision (citing authorities). This rule, however is subject to the well settled doctrine that courts will not so apply a change made in the construction of the law as it was held to be in the overruled case as to invade what is considered vested rights, or, in other words, while as a general rule the law as expounded by the last decision operates both prospectively and retrospectively, still courts are required to and do confine it in its operation so as not to impair vested rights such as property rights or those resting on contracts, express or implied (citing authorities). The true rule affirmed by the authorities and the prevailing one is to give a change of judicial construction in regard to a statute the same effect in its operation so as not to disturb vested rights as would be given to a legislative amendment—that is, apply the change in the interpretation of the law so as to operate prospectively and not retroactively.”

In the earlier decisions those preceding *Gelpcke v. City of Dubuque*, 1 Wall. 175, it does not appear that the distinction between a writ of error to a State Supreme Court and a writ of error to or appeal from a United States Court under the judiciary act of 1789 was either discussed, considered or decided.

In the cases involving the Ohio Statute, 16 Howard 391 and 431 *supra*, both cases were on writ of error to the Supreme Court of the State, the former opinion being by McLean, Justice, the latter by Taney, Chief Justice, the jurisdiction was upheld and both cases reversed because of the unconstitutionality of the decision in the Supreme Court of the State in that they impaired the obligation of the contract; later the precise question came again before this court in *Gelpcke v. City of Dubuque*,

supra, where the appeal was from the United States Court for the District of Iowa over a very vigorous dissenting opinion by Mr. Justice Miller, the rule that had been theretofore laid down was adhered to. It appears that Justice Miller was the only one to dissent and of the nine justices who concurred in the decision Chief Justice Taney and Justices Wayne, Satron, Nelson and Grier who were on the bench at the time of the decision in the Ohio cases, *supra*, were still on the bench participating in the decision in the Gelpcke case.

The question came again before the Supreme Court in 4 Wall. 177, on a motion to dismiss the writ of error to the Supreme Court of Iowa under the 25th Section of the judiciary act as no question appeared to have been made of a change by legislative enactment but the case was stated at page 181 as arising on the theory that "The Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts and the argument goes upon the fundamental error that this court can, as an appellate tribunal reverse the decision of a state court because that court may hold a contract to be void which this court might hold to be valid" and the writ of error was dismissed, all of the justices who participated in the decision in the Gelpcke case participating in this decision except that Mr. Chase had taken the place of Mr. Taney as Chief Justice. In the opinion where the judiciary act is referred to, it is not in terms considered but in *Knorr v. The Exchange Bank*, 12 Wall. 379, the bench being an entirely different bench from that which decided the Ohio cases in 16 How. with the exception of Justice Nelson, the opinion in the Rock case was adhered to and the writ was dismissed for lack of jurisdiction, no reference being made to the Gelpcke case.

The seeming discrepancy between the principle laid down in the Gelpcke case and that established in the Rock case, each of which was continuously followed by numerous decisions, is explained by the courts in numerous cases to depend upon the language of the judiciary act of 1789 and subsequent acts containing the same language by the fact that the provision for appeals and writs of error to United States Courts is unlimited as to the constitutional question while a writ of error to the supreme court of a state is not authorized unless the impairment of the obligation of a contract is alleged to be by a statutory enactment and not by judicial construction and as the appellate jurisdiction of this court is statutory it has no jurisdiction to decide a writ of error to a state supreme court where the impairment of the obligation of a contract is alleged to be by means of a change in judicial decisions while under the broader language of the judiciary act, it has jurisdiction over writs of error to and appeals from decisions of United States courts where the impairment is alleged to be by means of a change in judicial construction.

In two decisions, one in 1895, *Central Land Co. v. Laidley*, 159 U. S. 103, and the other in 1896; *Bacon v. Texas*, 163 U. S. 207, the opinions were pronounced by two great judges who had been translated to this court from great courts of their respective states whose high character was but little below that of this court and in each of these cases as well as of others that arose on this question until the case of *National, etc., Association v. Brahan*, 193 U. S., p. 635, post, the decisions were not that the changed construction of the statute was constitutional but simply that owing to the limited language of the judiciary act, this court could not entertain juris-

diction of a writ of error to a state supreme court and would simply dismiss the appeal for lack of jurisdiction.

In reality the Brahan case, *supra*, according to its syllabus (2nd Par.) and as subsequently cited appears to depart from this doctrine. Properly analyzed the decision, however, does no such thing.

(3) The decision of the Supreme Court of Mississippi in *Sokleski v. New S. B. & L. Association*, 77 Miss. 155 and the decision following it having been rendered long after the making of said contracts in so far as they define the public policy of Mississippi in regard to foreign building and loan associations are tantamount to judicial legislation and in violation of Sec. 10, Art. 1 of the Constitution of the United States.

This is a very wide departure from the proposition of changed construction of statutes. If this court should attempt to exercise jurisdiction where it was claimed that state courts had been guilty of judicial legislation, it would have scant time to attend to the other duties of a court. In brief, this decision cannot be said to amount to the dignity of overruling or even questioning the doctrine that had been theretofore announced and upheld, that under the judiciary acts, the appellate jurisdiction was not conferred upon this court over questions involving the contract impairment obligation clause of the constitution unless such impairment is alleged to have occurred in a statute enacted by a legislature. The learned author of the opinion in the Brahan case had occasion about a year later to write the opinion for this court in *Muhlker v. New York, etc., Co.* 197 U. S., 544. It does not seem to have occurred to the eminent counsel for plaintiff in error in that case to make any reference

to the Brahan case, although they cited a number of cases that are cited in this brief.

The writ of error was said to present two questions:

(1) A violation of the full faith and credit clause of the United States Constitution and (2) the effect of a change in the construction of a statute as impairing the obligation of a contract.

In the opinion of this court it is stated that the question was "that the decision of the Supreme Court of Mississippi was in effect an impairment of the contract between plaintiff in error and defendant in error and with respect to this contention, it concludes (1) this contention is untenable" and after quoting from *Bacon v. Texas* concludes "in the case at bar there was no subsequent statute, there was a change in decision, it is contended, but against a change of decision merely, Sec. 10, Art. 1, cannot be invoked."

The learned justice who handed down the opinion seems to have overlooked the very essence of the quotation that it had just written in the opinion which is: "So as to give this court jurisdiction on a writ of error to a state court." It was simply a question of jurisdiction under the judiciary act and not at all a question of the effect of a change of decisions on the impairment obligation clause of the United States Constitution. From the statement of the case it appears (1) (p. 637-8) that a contract had been entered into between the plaintiff and defendant in error in 1892, (2) (p. 640) Sec. 2342 of the * * * code of Mississippi * * * impairs the obligation of said contract, etc., nor does it seem to have occurred to the counsel for defendant in error to refer to it. In the *Muahlker* case in 197 U. S. 544, although it was perfectly apparent that within the rule that had up to that time obtained without exception that the writ

of error would be dismissed for lack of jurisdiction, no such motion was interposed nor did the court *sua sponte* dismiss it nor was it even suggested in the very elaborate and vigorous dissenting opinion that the court was without jurisdiction and the writer of the dissenting opinion concurred in by three other justices contents himself by saying, "I regret that I am unable to agree with the judgment of the court"—which was a judgment of reversal (which of course implied jurisdiction) because the decision impaired the obligation of a contract in that it was not in harmony with earlier decisions of the court on that question. In the dissenting opinion it is stated at page 573, "in other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque*, and *Louisiana v. Pillsbury*, 105 U. S. 278 as to public bonds bought on the faith of a decision that they were constitutionally issued."

The Brahan decision by the Supreme Court of Mississippi, 31 So. 840; 80 Miss. 407, not only did not overrule other decisions of the court on the subject but it, in express terms and appropriate language, planted itself firmly upon all of its previous decisions on that question and fortified its position by reference to decisions on a similar question in the courts of other states so that we beg to submit that as an entering wedge into a new line of authorities overruling the settled decisions of this court theretofore given is not entitled to very great consideration and if the law is to be proved as of no "probative force" whatsoever.

In *Tampa Waterworks v. Tampa*, 199 U. S. 243, the Muhlker case as well as the Gelpcke case are alluded to but neither in the line of criticism or disapproval, but

simply for the purpose of saying that they did not apply to the case at bar.

Central Land Co. v. Laidley, 159 U. S. 103 and *Bacon v. Texas*, 163 U. S. 207 have been numerously cited in cases where writs of error to the Supreme Court of the State had been dismissed but with nothing further than a reference.

The only two cases in which they have been formally discussed by this court in an opinion are *Cross Lake Club, etc. v. Louisiana*, 224 U. S. 632, (in which for the first and only time the Brahan case appears to have been cited), and *Ross v. Oregon*, 227 U. S. 150.

In the Cross Lake case the writ of error was dismissed for lack of jurisdiction, this court saying at pp. 638-9:

"It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question * * * *
But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted upon that that court erred in its conclusion respecting the validity or effect of the contract; *and this is true even where it is asserted*, (our italics) as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."

In challenging the constitutionality, it is not sufficient in this court to assert—it must appear and referring to the case under consideration in 123 Louisiana 208, it does not appear from the opinion that the constitutionality on the ground of conflicting decisions was presented in the state court, indeed the opinion of the Supreme

Court of Louisiana carefully emphasizes the fact that it is in entire harmony with its previous decisions.

As the writ of error was dismissed (instead of the case being affirmed) for lack of jurisdiction it cannot be said that it was intended to overrule its previous decisions on that question notwithstanding the language of the learned Justice who delivered the opinion goes perilously close to being in conflict with the principle that we contend for. If in fact this court under the language of the Judiciary Act had no jurisdiction over a writ of error to a state court on account of conflicting decisions it was its duty of course to dismiss the writ and it is not very important or persuasive, what language it might have used *arguendo* in so doing..

In *Ross v. Oregon*, 227 U. S. 150, the opinion sets out that it was contended in the lower court: (1) That the depository act was not susceptible of the construction adopted; (2) that to put such a construction on it would violate the prohibition against *ex post facto* laws. Both contentions were then denied and plaintiff in error claims that he was deprived of a right received by the constitution.

In the opinion of the learned Justice at p. 161 it is stated:

"The real complaint which we are asked to consider is not that the Supreme Court of the State in any wise rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a pre-existing statute to the disadvantage of the plaintiff in error and that such a decision is an *ex post facto* law within the meaning of Art. I, Sec. 10, of the Constitution, which declares: 'No state * * * shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' " In view of the fact that the case that the court had under considering the obligation of contracts."

In view of the fact that the case that the court had under consideration was a criminal case claimed to be "*ex post facto*," to advantage the writer of the opinion might have eliminated from his quotation "any bill of attainder" or "law impairing the obligation of contracts." The court then continues at p. 161:

"But that provision of the constitution, according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning."

No reference is made to the limitation in the judiciary act on writs of error to a state supreme court, but the writ was dismissed because no Federal question was presented.

After referring to two cases concerning which the learned Justice says that neither of them arose upon this question he refers to the case of *Commercial Bank v. Buckingham's Executors*, 5 How. 317, and calls attention to the fact that

"The Supreme Court of Ohio, in an action upon a contract, had put upon two pre-existing statutes of the state a construction which was claimed to be unreasonable and to impair the obligation of the contract. * * * But the writ of error was dismissed for want of jurisdiction, because as was said in the opinion (p. 342): 'If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but whether the Supreme Court of Ohio has erred in its construction of them. * * * The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.'"

In that case Mr. Justice Grier at p. 341 states the contention as follows:

"The first and only question necessary to be decided in the present case is whether this court has jurisdiction to bring a case for a writ of error or an appeal from the highest court of a state within the 25th Section of the Judiciary Act it must appear on the face of the record (1) that some of the questions stated in that section did arise in the State court, and (2) that the question was decided in the state court as required in the section.

It is not enough that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the court impaired the obligation of a contract and violated the provisions of the Constitution of the United States 'and that this claim was overruled by the court,' but it must appear by clear and necessary intendment that the question must have been raised and must have been decided in order to induce the judgment."

And at page 342:

"Did the decision of this point draw in question the validity of either of these statutes on the ground of repugnancy to the Constitution of the United States or was the court merely called upon to decide on their construction * * * but grant that the decision of that court could have this effect it would not make a case for the jurisdiction of this court whose aid can be invoked only where an act alleged to be repugnant to the Constitution of the United States, has been decided by the state court to be valid and not where an act admitted to be valid has been misconstrued by the court. * * * If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its construction of it * * * and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense

that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States and not for the correction of alleged errors committed by their judiciary."

And the writ was dismissed for lack of jurisdiction.

Neither in the statement of the case preliminary nor in the opinion itself is there the slightest suggestion of conflicting decisions by the supreme court.

The court in the decision of this case was constituted precisely as it was when the cases in 16 How., *supra*, were decided except that in the later case Mr. Justice Curtis had succeeded Mr. Justice Woodbury and Mr. Justice Campbell had succeeded Mr. Justice McKinley and there is no indication in the cases in 16 How. that the court regarded its then decision as out of harmony with the case in 5 How.

In *New Orleans etc. Co. v. Louisiana etc. Co.*, 125 U. S. 18, the contention is stated by Mr. Justice Gray, at pp. 28 and 29, as follows:

"The only grounds on which plaintiff in error attacks the judgment of the State court are that the court erred in its construction of the contract between the State and the plaintiff, contained in the plaintiff's charter; and in not adjudging the ordinance of the city council, granting to the defendant company permission to lay pipes from its factory to the river, was void, because it impaired the obligation of that contract.

The arguments at the bar were principally directed to the question whether upon the facts proved the factory of the defendant company was contiguous to the river. But that is not a question which this court upon this record is authorized to consider.

This being a writ of error to the highest court of a State a federal question must have been de-

cided by that court against the plaintiff in error; else this court has no jurisdiction to review the judgment."

And at page 30:

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed."

In this case there was no question whatever of conflicting decisions. In this case there is no question presented of subsequent decisions overruling various decisions so as to affect contract rights.

In the case of *Brown v. Smart*, 145 U. S. 454, no question whatever was presented of conflicting decisions by the court.

In *Turner v. Wilkes County Commissioners*, 173 U. S. 461, the writ of error was to the Supreme Court of North Carolina and it was said by Mr. Justice Peckham, at p. 463:

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a state court we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are therefore bound by the decision of the state court, in regard to the meaning of the constitution, and the laws of its own State, and its decisions upon such a state of facts raises no Federal question. OTHER PRINCIPLES OBTAIN WHEN THE WRIT OF ERROR IS TO A FEDERAL COURT. (Our italics.)

The difference in the jurisdiction of this court upon writs of error to a state as distinguished from a federal court, in questions claimed to arise out of the contract clause of the constitution, is set forth in the opinion of the court in *Central Land Co. v. Laidley*, 159 U. S. 103."

And the court then quotes with approval from the language at p. 111, in which is pointed out clearly and precisely the distinction in the rule which governs where the writ of error is to a state court and where the writ of error runs to, or the appeal is from the decision of a United States Court and the very case which Mr. Justice VanDevanter cites with approval in *Ross v. Oregon*, completely establishes the correctness of the principle upon which this appeal is predicated and we assert with earnestness and confidence that the principle of the *Gelpcke* case has never been disturbed by any subsequent decisions of this court and it remains the law of the land and should control this decision.

We cannot more appropriately close the discussion on this point than to commend to the consideration of this court, the concluding sentence in the opinion of Mr. Justice Swayne in *Gelpcke v. City of Dubuque*, 1 Wall., at pp. 206-7:

"We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."

III.

3. WHERE THE CONSTITUTIONAL QUESTION IS IN THE RECORD IT WILL BE CONCLUSIVELY PRESUMED TO HAVE BEEN DECIDED, ALTHOUGH NO SPECIFIC LANGUAGE IS USED IN THE OPINION ON THAT SUBJECT.

Where the case necessarily tenders the question whether a particular act is unconstitutional and the judgment of the court below is affirmed and subsequently, in another case the question arises whether the act under consideration is constitutional, the prior decision will be held conclusive on that point.

Douglass v. County of Pike, 111 U. S., at p. 680.

In the long list of cases included in paragraph 12 of the Master's Report, P. R. pp. 135-7, and in the cases named in Appendix A as arising under the Acts of 1852, 1873 and 1883, it is quite true that no single case is found among them where, in considering questions that arose under Sec. 12 of the Act of 1883, the precise objection was made that in the title of the act, although it appeared in the body, contractors and subcontractors were not in terms named, and that for that reason the act was unconstitutional *quoad* contractors and subcontractors as in violation of the terms of Sec. 19 of Art. IV, of the Constitution of Indiana.

It is true, however

1. That the subject matter of the act was "mechanic's liens," mechanics, laborers and material-men being in terms named, while contractors and subcontractors *eo nomine* were not mentioned in the title, but were in the body of the act; they were, however, of the same gen-

eral character, for they furnished the "mechanics, laborers and material-men" who added to the value of the property on which they caused work to be done, and except for the language of the Supreme Court in *Indianapolis, etc., v. Brennan*, discussed *post*, it would seem not improper to suggest that the distinction sought to be drawn was hypercritical "to a certain intent in every particular," and it could not, we submit, be beyond the line of legitimate construction to say that, in considering "mechanics, laborers and material-men" equally with those who as contractors and subcontractors supplied them to the building, the latter were within the meaning of the provision, "properly connected therewith."

2. In *Hall v. Bunte*, 20 Ind. 304—the case of a contractor as disclosed by the record—the precise objection was made, pointed out and discussed that the language of Art. XXXVI was not embraced in or covered by the title of the act which was "to revise, simplify and abridge, etc.," not the slightest suggestion of the conferring of a right or affording a remedy, for a right that had not been created, and by Sec. 802 of the practice act "all laws inconsistent with the provisions of this act are hereby repealed," and so the Acts of 1838 and 1843 went to the scrap heap.

The court refused its assent to this contention and affirmed the decree, thus in terms holding that the lien provision of Art. XXXVI under the subtitle "To enforce mechanic's liens on buildings"—and this was the only shred or patch of a title referring thereto in the act—protected contractors in their right to take hold and enforce a mechanic's lien upon a building to which they had added a value, through the mechanics, material-men

and laborers that they had employed to do the work for them.

3. It is not entirely accurate to say that it is necessary to present a question for decision by the Supreme Court that the precise contention should be presented to the court in the particular case considered by the court. Those matters are *res judicata* between the parties, whether presented or not, provided only the record is in shape that they might have been presented and adjudged. *Fischli v. Fischli*, 1 Blf. 360, has never been departed from in this State, and has not only not been weakened but has been strengthened by all subsequent decisions.

In *Read v. Yeager, Auditor, etc., et al.*, 104 Ind. 195, the acts of the legislature on the subject of free turnpikes came before the court for consideration with reference to the charter of Evansville, it being claimed that the charter forbade the application of the general law to the citizens of Evansville, and it was held that this construction was unfounded and the law as applicable to the citizens of Evansville was upheld. There was not the slightest suggestion in the opinion of an attack on the constitutionality of the law. It was nevertheless certain that if the law was unconstitutional the judgment should have been reversed for the all sufficient reason that there was no valid law authorizing or permitting the assessment complained of, but the judgment was affirmed and the assessment upheld.

Later, in *Byram v. The Board, etc.*, 145 Ind. 240, this law again came before this court for consideration, the claim being that it was unconstitutional; of this contention the court said, at p. 242:

"The exact question here involved was decided by this court adversely to appellant's contention in *Read v. Yeager, Auditor*, 104 Ind. 195. It is

contended, however, on behalf of the appellant, that the constitutional question here raised and discussed was neither discussed nor decided in that case, etc.," and at p. 251: "The question of the constitutionality of the statute under consideration was necessarily involved, though not discussed in *Read v. Yeager*, *supra*, and was *necessarily* (our italics) decided against the appellant's contention. We adhere to that ruling."

In *Douglas v. County of Pike*, 101 U. S. 677, the constitutionality of an act of Missouri was assailed. The law had been upheld in *The County of Cass v. Johnson*, 95 U. S. 360, and the Chief Justice, at p. 679, quotes from the language of Judge Dillon:

"A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the Federal Courts of this state and prior to the decision in *Harshman v. Bates Co.*, (92 U. S. 569), none of the able lawyers defending these cases ever made a point that the Act of March 23, 1868, was unconstitutional."

Of the contention of unconstitutionality the Chief Justice says, at p. 680:

"All the objections presented were considered by the court, and in conclusion it was said 'the county court having made the subscription, the company is entitled to the bonds.' It is quite true that the *precise* (our italics) objection which has since been raised was not then urged or considered; but the alleged discrepancy between the act and the constitution was just as apparent then as it is now, etc."

In each and every of those cases set out in the Master's Report, *supra*, and Appendix A, namely, those arising

under the Acts of 1852, 1873 and 1883, fifty-four in all, it was just as apparent as it was in the *Indianapolis Northern etc., Co. et al. v. Brennan et al., supra*, that the words "contractor" and "subcontractor" were not named in the title of the act although they were specifically mentioned and provided for in the body and if, because of that omission from the title, either the act ought to have been held unconstitutional, or they should have been construed as not including contractors or subcontractors within their terms.

Such holding and such construction was challenged in each and every of said cases and each and every of the cases should be deemed and treated as an authority to the effect that the acts were constitutional and that contractors and subcontractors were embraced in their terms and were entitled to the benefit of the acts.

4. THE REMEDY AFFORDED BY LAW FOR THE ENFORCEMENT OF A CONTRACT WITH REFERENCE TO THE CONSTITUTIONAL PROHIBITION AGAINST THE IMPAIRMENT OF THE OBLIGATION OF A CONTRACT.

The remedy for its enforcement is a substantial part of the obligation of a contract; it may be modified, added to or other remedies substituted in lieu of the old one, but it cannot be repealed or materially lessened without violating the constitutional provision safeguarding the obligation of a contract.

Edwards v. Kearzey, 96 U. S. 595;
Von Hoffman v. Quincy, 4 Wall. 535;
Planter v. Sharp, 6 How. 301;
Curran v. Ark., 15 How. 304;
McCracken v. Hayward, 2 How. 608;
Bronson v. Kinzie, 1 How. 311;

Seibert v. Lewis, 122 U. S. 294;
Mobile v. Watson, 116 U. S. 304;
Daniels v. Tearney, 102 U. S. 419;
Oshkosh, etc., Co. v. Oshkosh, 187 U. S. 437;
The Queen, 93 Fed. 834;
Fisher v. Greene, (Ill.), 31 N. E. 176;
Phinney v. Phinney (Me.), 17 Atl. 409.

In *Curran v. Arkansas*, 13 How., at 319, "but it by no means follows, because the law affects only the remedy, that it does not impair the obligation of a contract. The obligation of a contract in the sense on which these words are used in the constitution is that duty of perfecting it, which is recognized and enforced by the laws, and if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

In *Von Hoffman v. City of Quincy*, 4 Wall. 535 it was said by Mr. Justice Swayne, at pp. 548-9:

"It is then a part of the case before us that when the bonds were issued and negotiated there were statutes of Illinois in force which authorized the levying of a sufficient special tax to pay the coupons in question as they became due * * * and at p. 550, "It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement," and, at p. 552, "Nothing can be more material to the obligation than the means of enforcement. Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist and its obligation to fall within the class of those

moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden * * *."

And quoting with approbation from *Green v. Biddle*:

"One of the tests that the contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. * * * It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution and to that extent void."

Perhaps the most satisfactory statement of the proposition is that given by Mr. Justice Swayne in *Edwards v. Kearsey*, 96 U. S. 595, in which he says, at pp. 599, 600, 601-2:

"The Constitution of the United States declares 'that no state shall pass any * * * law impairing the obligation of contracts.' A contract is the agreement of minds upon a sufficient consideration that something specified shall be done

or shall not be done. The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.' Webster's Dictionary. 'Obligation' is defined to be 'the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath or contract, etc., &c. * * *'. Id. The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract as such in the view of the law ceases to be and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' * * * It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms * * *," and at p. 602, "The power to tax, involves the power to destroy. *McCulloch v. Maryland*, 4 Weaton 416. The power to modify at discretion, the remedial part of a contract is the same thing."

5. THE CLAIM THAT THE CONSTRUCTION COMPANY HAD WAIVED ITS RIGHT TO A MECHANIC'S LIEN, BY THE CONTRACTS OF FEBRUARY 21, AND JUNE 6, 1906, AND THE EXTRACT FROM THE UNDERWRITING AGREEMENT REPORTED BY THE MASTER.

The settlement of this question necessarily presents the construction to be given to the above contracts in connec-

tion with the concluding portion of Paragraph 13 of the Master's Report. (Printed Rec. p. 138.)

It is doubtless true that if the Construction Company had in fact by its writings so bound itself up that it might not claim the benefit of the lien laws of the state, it might not thereafter claim their benefit, notwithstanding it did the work, furnished the materials and money necessary to enable it to complete its contract—that of February 21st, which was the only one under which it did any work, furnished any materials or money—in the full belief that in so doing it was protected by the laws of the state, for if it had contracted to the contrary, its belief would be unimportant—it would have no right to believe contrary to the express terms of its contract.

There was, however, no exception presented by either of the appellees or any one to this paragraph of the Master's Report or any part thereof and upon this record the facts so reported stand as conceded and agreed upon by all the parties to the record.

It is quite essential therefore to reach a precise and accurate construction of the contracts to ascertain:

- (a) Whether there was a waiver.
- (b) By whom the waiver was made, if by anyone.
- (c) What it was, if anything, that was waived.

1. The contract of February 21, 1906, is attached to Construction Company's cross-bill (Printed Rec. pp. 36-9), and is referred to in the Master's Report in Paragraph 7 (Printed Rec. p. 124), and by reference is made part of the report.

2. The portion of the Underwriting Agreement of same date—February 21—as the master deems apposite is set out in Paragraph 4. (Printed Rec. p. 121.)

3. The contract of June 6th, between the Installation and Traction Companies—executed however by the Construction Company, is set out in *extenso* in Paragraph 8, of the Master's Report. (Printed Rec. p. 125 to p. 132.)

In order—if possible—to simplify the question and bring it to a precise issue, we have attached to this brief, as Appendix "C," everything in our opinion that is contained in these papers above named, that will throw any light on the question of waiver, so far as the writings themselves are concerned. In that connection we desire to refer as we have done, *supra*, to Paragraph XIII, of the Master's Report, Printed Rec. p. 138, to which there was no exception taken, nor was there any exception to the evidence on which the finding was made and reported as throwing whatever light it might legally or equitably throw on the situation.

1. The Underwriting Agreement was apparently executed concurrently with the contract of February 21, between the Construction and Traction Companies, for building the railroad; at any rate it bears the same date and has reference to the road that was thereafter built. At this time the railroad was simply a paper road "a ——— barren ideality" not even possessed of Mr. Ingersoll's contemptuous description of "two streaks of rust and right-of-way." It was precisely in the condition described in *Farmers, etc., Co. v. Canada, etc., Co.*, 127 Ind. 250. At this time no mortgage deed of trust or bonds had been issued by the Traction Company. It was not executed by the Construction Company, and neither in or between its lines, is there anything set forth that the Construction Company was either to do or not to do.

2. Construction Company began work March 26, 1906, Master's Report Paragraph IX. (Printed Rec. p. 132.) The contract of February 21st, Paragraph VII,

(Printed Rec. p. 124), provides that monthly estimates should be made on or before the 10th of each succeeding month for the amounts due for the preceding month; it does not affirmatively appear when the first estimate was made, but it does affirmatively appear—Master's Report Paragraph IX—that estimate No. 9, for work done in December, 1906, was made January 10, 1907, so that it is certain that work sufficient had been done before May to call for an estimate in May for work done prior thereto, which was before the execution either of the contract of June 6th or of the Trust Deed.

Under the law of Indiana the lien reverts to the time when the first work was done, Sec. 8298, R. S. 1908, Appendix B, and shall have priority over all liens thereafter created.

3. The Trust Deed—*supra*—was not executed until May 21st, so that by the express terms of the statute, wholly independent of the decision in *Farmers etc. Co. v. Canada etc. Co.*, *supra*, which constituted the law of the State it was executed subject to whatever lien for the construction of the road might thereafter accrue to the Construction Company that might remain unpaid.

4. The contract of June 6th was entered into after work had been done, one estimate had been made and the second was about due.

We have never been able to, nor are we now able to appreciate what light—or darkness—is thrown on the questions at issue on this appeal by the Underwriting Agreement and do not deem that it now—and until we hear from appellees—requires discussion.

By its contract of February 21st, the Construction Company agrees:

1. To construct the line at a stated price payable on monthly estimates:

"The same to be * * * free and clear of any claim and demand **CREATED BY OR AGAINST THE CONSTRUCTION COMPANY**, for which any lien has been or could be taken upon the railroad or any other property, or for which said Traction Company or its railroad or any other property has been or could be made liable."

6. "Before the final settlement is made * * * the said Construction Company shall furnish evidence satisfactory * * * that the work covered by this contract is free and clear of all liens for **LABOR OR MATERIAL**, that no claim then exists against the same for which any lien could be enforced."

This language was used:

(a) With reference to the provision in the contract that the Construction Company should furnish all the labor and material and do all the work required to complete the work.

(b) With reference to the provisions of the act, especially as construed in *Barker v. Buell*, 35 Ind. 297,—which except in *Colter v. Freese et al.*, *post*, has never since been doubted or questioned, that any person performing labor or furnishing material in the erection of a building was entitled to this lien, without any reference to the contractor or subcontractor, and it is not at all material to the validity of this lien, that the owner had, prior to the filing of the notice of intention to take a lien, paid to the contractor the full contract price agreed upon between owner and contractor.

Colter v. Freese et al., 45 Ind. 96, in which case *Hall v. Bunte et al.*, 20 Ind. 304, as to the constitutionality of the Act of 1852, was reaffirmed.

If the owner and contractor by giving and receiving

payment in full of the contract price might not affect the right of a subcontractor or material-man to take a lien, it is difficult to see how in this State under its acts, the contractor or subcontractor, by a stipulation not to take a lien, could deprive those who were under the contractor, from taking and enforcing a lien, although in other States under other statutes such contention has not infrequently been upheld.

3. By the contract of June 6th, certain of the work that by the contract of February 21st—the whole—was to have been done by the Construction Company, was to be done by the Installation Company, but inasmuch as by that contract certain of the work—practically the electrical work—was to be taken away from the Construction Company, and given to the Installation Company, it was necessary that the Construction Company should in some appropriate way signify its assent thereto. This might well have been done by a separate instrument, but for reasons satisfactory to the three parties, it was embodied in a contract, which by its terms purported to be a contract between the Traction and Installation Companies alone.

This contract prescribes:

- (a) What shall be done by the Installation Company.
- (b) What shall be done by the Traction Company.
- (c) What part in the contract the Construction Company sustains.

The contract provides that the Installation Company shall, Paragraph I, do the electrical work prescribed, but, Paragraph II, shall not be held responsible for work done, material furnished or repairs made by others.

Paragraph X, to accept in part payment of the contract price, stock and bonds to the extent of \$450,000, at 45 cents face or par value of the stocks and bonds, the

payments to be approximately one-third in stocks and bonds, and two-thirds in cash.

Paragraph XI, Installation Company shall not be required to commence work until all of the bonds (\$1,500,000.00 in amount), have been signed and certified by the Trustee.

The Traction Company on its behalf agrees:

(1) Paragraph II, to provide the Installation Company with all necessary rights-of-way, etc.

(2) Paragraph III, not to hinder the contractor from prosecuting the work from start to finish, and agrees that *THAT PORTION OF THE CONSTRUCTION WORK WHICH IS TO BE DONE BY THE MOORE-MANSFIELD CONTRUCTION COMPANY*, (Our Italics), shall be completed free from any claim of indebtedness, the holders of which may under the laws of the State of Indiana, or of the United States be entitled to a lien of any kind against any of the property of the railway company, so that the railway company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said railway company upon the completion of the construction and equipment of its line.

(3) Paragraph X, to pay the Installation Company \$560,000.00 on estimates, \$202,500.00 of which amount is to be paid in stock and bonds aggregating \$450,000.00 at the rate of 45 cents on par or face value and the residue \$357,500.00 in cash.

(4) Paragraph XII, $7\frac{1}{2}$ per cent. of each estimate to be retained to insure the faithful performance by the Installation Company of its contract.

The Construction Company, by Paragraph XIII:

- (a) Formally approves the terms, etc., of the contract.
- (b) Agrees that it will do all acts necessary to the car-

rying out of this agreement SO FAR AS THE SAME RELATES TO MOORE-MANSFIELD CONSTRUCTION COMPANY.

What was then the situation when the contract of June 6th, had been executed?

1. The Installation Company had a specific contract to do a certain specific work for \$560,000.00 payable \$202,500.00 in stock and bonds at 45 cents and \$357,500.00 in cash, on estimates and was not to be responsible for liens taken by others on account of its work.

2. The Construction Company was to do the remainder of the work at cost and 12½ per cent. representing its profit payable on estimates and was to take care of all indebtedness incurred by it, so as to prevent those who at its instance had furnished materials or performed labor, from taking liens on the property.

3. The Traction Company was to keep its line free from all liens, so that the mortgage bonds should not be discredited or the value of its stock impaired by outstanding indebtedness whether lien or otherwise.

Briefly stated it seems to us that all that was required of the Construction Company under these contracts was to pay all claims of subcontractors, laborers and material-men that had done anything under the work assigned to it, so that no liens should exist on its account except the one for the final balance due it and that it should be prepared to and would discharge this when, and as it was paid, and this the Master's Report Paragraph IX shows it did. (Printed Rec. p. 134.) By no stretch of the imagination, or rule of construction, could anything else be required of it.

It was doubtless true that it was highly desirable that

the bonds should be made and kept a first lien, but that was a comparatively easy thing for the Traction Company.

There were but two parties through or under whom any possible lien could be taken, viz: The Construction Company, the Installation Company, and no liens could be taken through or under either unless it should fail to pay the parties who through and under them performed labor or furnished materials, and as to this the Traction Company had the control of the situation.

All that it had to do so far as Moore-Mansfield was concerned, was to pay the balance of the estimates commencing with the 9th, when the Construction Company's lien would be released; there were absolutely no subcontractors, laborers or material-men's liens, whatever as against the Construction Company's work.

So with the Installation Company. It is not claimed on the record either:

(a) That there were any liens outstanding;

(b) That if there were the Construction Company had agreed to take care of them.

It's "a far cry to Lochow," to say that because the Construction Company had assented to the contract between the Installation Company and the Traction Company, had agreed that the portion of the work to be done by Moore-Mansfield should be completed free from liens, the Construction Company had become a guarantor for the Traction Company, as to the indebtedness due the Construction Company.

It is doubtless possible that in days of "High Finance" estimable gentlemen, who have succeeded in getting a right-of-way over county roads and desire to build a railroad without putting any money into it, except as they acquired the securities of the company at 45 cents on the

dollar and hope to make their profit out of it as well as a railroad, that they may come to grief, but if they do is no reason why others who relied on the security that the law affords, should be deprived of their compensation and required to pocket the loss, and if it should be suggested that the innocent bondholder should be protected it is a sufficient answer to say that every person who purchased a bond is held to knowledge under the *Farmers etc. Co. v. Canada etc. Co.*, *supra*, which had been the settled law of this State for over fifteen years before this Trust Deed was executed, that if he wants a first lien he or his trustee must see to it that the mechanic's liens shall be paid.

Notwithstanding the opinion by the Supreme Court of Indiana in *Indianapolis Northern etc. Co. et al. v. Brennan et al.*, *supra*,—so thoroughly discredited in the Newcastle case, *supra*, we are moved to say with Mitchell, J., in his dissenting opinion in *St. ex rel., etc., v. Denny Mayor*, in 118 Ind., at p. 412, Mechanic's Lien Laws:

“Are not to be regarded as common enemies whose speedy extermination is specially committed to the courts.”

They are highly remedial: are favorites of the law and represent a strong equitable principle that the man whose means or labor or material have created something of value shall be assisted in getting compensation therefor.

There was no express waiver: The money, material and labor went into the road in the full belief that the law gave the Construction Company a security: Could it be said to have done so if it had voluntarily thrown away “the mess of pottage” and would it have thrown away “its mess of pottage,” if the opportunity had been offered? Clearly the Construction Company had bound itself to

put money into this road by the hundreds of thousands, having an absolute security; can it be supposed that it voluntarily threw its security away, and remained bound to furnish the money, the material and the labor required to complete the road on a chance that it might be paid, while it had in its own hands the certainty of coercing payment if it were not voluntarily paid?

In the court below, as we presume, will be the case here, the defendants cited or insisted that certain decisions by the Courts of Indiana settled the question of waiver in their favor on the right to take a mechanic's lien and it is not out of place in advance of the coming in of appellees' brief to refer somewhat briefly to the cases from this State, so cited below.

1. *Miller et al. v. Taggart et al.*, 36 Ind. App. 595. In this case the appellants had united with the principal contractor in a bond "for the purpose of saving harmless said obligee (the owner), from any and all mechanic's liens, etc." p. 597.)

The appellees, the owners, the contractor, having failed to complete the building on formal notice to the sureties on the bond, took charge of the unfinished work, and completed it, whereupon the appellants, the sureties on the building bond, filed notice of their intention to hold a mechanic's lien, as to which the court said, at p. 599 "having thus obligated themselves to the owner" (——— "of saving the owner harmless from any and all mechanic's liens," *ibid* ———), appellants cannot be permitted to enforce a mechanic's lien filed by themselves, etc."

Clearly if they had been permitted to enforce a lien, under the express terms of the bond, they would be liable to the owner for whatever amount they might receive on their lien and it would have been absurd to permit them to

take a lien only to have its benefits taken away from them in a suit upon the bond they had executed.

2. In *Swift Co. v. Dolle, Recr.*, 39 Ind. App. 653, it had been agreed:

(a) By the principal contractor that he would keep the real estate free from any mechanic's liens. (p. 657.)

(b) By the subcontractor—the Ransome Company.

1. "To keep the real estate * * * free from mechanic's liens." (*Ibidem*, p. 658.)

2. To furnish a bond in the sum of \$50,000.00 for the faithful performance of its contract. (p. 655-6.)

3. To accept in part payment of so much of its contract price, \$5,000.00 in the stock of the Hotel Company.

That the subcontractor failed to complete its (the Ransome Company's) unfinished contract, p. 656, and failed to furnish the bond it had agreed to furnish.

After citing a number of cases, including *Dershemier v. Maloney*, 143 Pa. St. 532, the court concluded at p. 664 that, "the Ransome Company is not not entitled to a mechanic's lien."

Dershemier v. Maloney, nearly four years before its citation had been overruled by the Supreme Court of Pennsylvania in *Nice v. Walker*, 153 Pa. St. 123, 25 Atl. 1065, of which we shall have more to say later.

3. In *McHenry v. Knickerbocker et al.*, 128 Ind. 77, it was held as in *Miller v. Taggart*, that the material-man being a surety on a contractor's bond, might not retain or enforce a mechanic's lien, against which it was one of the purposes of the bond to protect the owner.

4. To the same effect is *Closson v. Billman*, 161 Ind. 611, we have no controversy or fault to find with either of these cases, but they lack a great deal of establishing any proposition that is important or controlling in this case.

In *Nice v. Walker*, 153 Pa. St. 123; 25 Atl. 1065, it was held after a careful consideration and analysis of the preceding cases in that State on the subject of mechanic's liens that a provision in a building contract "that the owner will not in any manner be answerable or accountable * * * for any of the materials or other things used and employed in finishing and completing the said works," did not constitute a waiver by the contractor of his right to take a lien. In reaching this conclusion, the court used in its opinion the following language, speaking of the alleged waiver, at p. 1066 of 25 Atl.:

"It should be so plain that every mechanic and material-man, though of limited education, can understand it at a glance, and not be compelled to submit its interpretation to a lawyer with the risk of a decision against him in the court of last resort."

And at p. 1067, *ibidem*:

"It will be noticed that there is something more here than an agreement to deliver the building to the owner free of all incumbrances. There is a further stipulation that the provisions of the ninth section of the contract shall not be taken to subject the building to any liability for the payment of labor or materials furnished in or about the erection thereof. While a lawyer may be able to find in the language quoted an implied covenant against filing liens, the mechanic or material-man might be misled thereby. * * * It is not the contract that subjects the building to liens, but it is the law which renders it so liable and the contract should have expressly prohibited the filing of liens."

The court concludes its opinion:

"We are of opinion that in order to prevent the contractor or subcontractor from filing a lien against the building, there must be an express covenant against liens or a covenant resulting as a

necessary implication from the language employed and that the implied covenant should so clearly appear that the mechanic or material-men can understand it without consulting a lawyer as to its legal effect."

In this connection it is quite proper to point out:

(a) The Construction Company did not so understand it, for Paragraph No. XIII of the Master's Report (Printed Rec. p. 138), specifically, and in terms finds that at all times during the progress of the work it relied upon its right to take and maintain a lien (—which it could not have done if it had waived such right—) and there was no exception either to the Master's Report or to the evidence upon which this finding was based.

(b) The learned counsel for the appellees and each of them did not so understand it until the stress of the situation arose at the time of considering the decree, compelled them to make, consider and press the claim.

If the right of appellant to take and hold a lien had been waived, it was by virtue of the language contained in the contracts of February 21 and June 6, 1906, each of which was specifically made a part of our cross-bill and if the contention now insisted upon was correct, a demurrer to the cross-bill would have disposed of the whole question. That no such demurrers were interposed by any of the parties resisting the lien is conclusive upon them that then at any rate, the solicitors entertained no such conception. They had the right of course to grow, and subsequently having advised themselves better, to present and insist upon the point but when they do so it cannot well be said that the construction was so clear and plain that the common man—to say nothing of learned and able solicitors—would have so understood it.

See also Boisot's Mech. Liens, Sec. 746, and authorities cited.

If the contract is fairly and reasonably susceptible of any other construction, it will not be construed as waiving the contractor's right to a lien.

Cresswell, etc., Works v. O'Brien, 156 Pa. St. 172, 27 Atl. 131;

Lucas v. O'Brien, 159 Pa. St. 535, 28 Atl. 364;

Gordon v. Norton, 186 Pa. St. 168-174, 40 Atl. 312;

McLaughlin v. Remhart, 54 Md. 71-7;

Zarrs v. Keck, 40 Neb. 456, 58 N. W. 933;

Poirier v. Desmond, 177 Mass. 201, 58 N. E. 684.

Van Stone v. Stillwell, etc., Co., 142 U. S. 128, at p. 136-7;

Lee v. Hassett, 39 Mo. App. 67;

Dairs et al. v. La Crosse, etc., Assn., 121 Wis. 519, 99 N. W. 351;

Irish v. Pulliam, 32 Neb. 24; 48 N. W. 963;

Hines et al. Cochran et al., 44 Neb. 12, 62 N. W. 299;

Commonwealth, etc., Co. v. Ellis, 5 Pa. Dist. R. 33.

We, therefore, earnestly insist, upon the record:

1. That the appellant under the law of Indiana was entitled to take, hold and enforce its lien upon the railway property, that was brought into existence by its money, material and labor, notwithstanding the opinion of the Supreme Court of Indiana in *Indianapolis, etc., et al. v. Brennan et al.*, *supra*, that opinion being itself an unconstitutional construction of the lien law of the state in violation of Sec. X of Art. 1, of the Constitution of the United States, forbidding the impairment of the obligation of a contract.

2. That the appellant had neither expressly or by implication waived its right to take, hold or enforce its mechanic's lien,

And that, therefore, the judgment be reversed and set aside and this cause remanded to the court below with instructions to modify its decree so as to provide that the lien of appellant on the railway property was and is senior and paramount to the lien of either or any of the appellees.

Respectfully submitted,

A. S. WORTHINGTON,
WILLIAM A. KETCHAM,
Solicitors for Appellant.

APPENDIX "A."

TITLES OF VARIOUS MECHANIC LIEN ACTS FROM
1834-1909, INCLUSIVE, AND CASES IN SUPREME AND APPELLATE COURTS ARISING THEREUNDER, NAMELY.

1. Act of 1834—"An act giving to mechanics a lien upon buildings, approved February 3, 1834," Acts of 1834, p. 165.

Robinson et al. v. Marney et al., 5 Blackford 329.

2. 1838—"An act giving to mechanics a lien upon buildings, approved February 17, 1838," Revised Statutes of 1838, p. 412.

McKinney v. Springer et al., 6 Blackford 511.

3. 1843—"On the lien of mechanics and others on buildings, Revised Statutes of 1843," p. 776.

Pifer v. Ward et al. 8 Blackford 252;

Littlejohn v. Nillironz et al., 7 Ind. 125;

Bishop v. Boyle, 9 Ind. 169;

Holland et al. v. Jones, 9 Ind. 495.

4. 1852—"An act to revise, simplify and abridge the rules, practice, pleading and forms in civil cases in the courts of this state—to abolish distinct forms of action at law and to provide for the administration of justice in a uniform mode of pleading, and practice without distinction between law and equity; approved June 18, 1852. * * * Art. XXXVI to enforce mechanic's liens on building. Statutes of 1852, p. 181, Sec. 647."

Deming v. Patterson, 10 Ind. 251;

Wasson v. Beauchamp, 11 Ind. 18;

Millikin et al. v. Armstrong et al., 17 Ind. 456;

Hall et al. v. Bunte, 20 Ind. 304;

- Peck et al v. Hensley*, 21 Ind. 344;
Caldwell et al. v. Asbury, 29 Ind. 451;
Kellenberger v. Boyer et al., 37 Ind. 188;
Capp v. Stewart et al., 38 Ind. 479;
Sharpe et al. v. Clifford et ux., 44 Ind. 346;
Greenup et al. v. Crooks et al., 50 Ind. 410;
City of Crawfordsville v. Johnson et al., 51
 Ind. 397;
Crawfordsville v. Brundage, 57 Ind. 262;
Killian et al. v. Eigemann, 57 Ind. 480;
Schneider v. Kolthoff et al., 59 Ind. 568;
Princeton v. Gebhart, 61 Ind. 187;
Harrington v. Dollman, 64 Ind. 255;
Irwin et al v. The City of Crawfordsville, 58
 Ind. 492;
Vail et ux. v. Meyer, 71 Ind. 159;
Hamilton v. Naylor et al., 72 ind. 171;
Nordyke, etc., Co. v. Dickson et al., 76 Ind. 188;
Mark v. Murphy et al., 76 Ind. 534;
Stephenson et ux. v. Ballard et al., 82 Ind. 87;
Thomson v. Shepard, 85 Ind. 352.

5. 1873—"An act to give security to persons who contract with railroad corporations to perform work and labor in the construction of railroads and declaring an emergency." Acts of 1873, p 187.

Midland, etc., Co. v. Wilcox et al., 122 Ind. 84.

6. 1883—"An act concerning liens of mechanics, laborers and material men; approved March, 1883." Acts of 1883, p. 140.

- Gortemiller v. Rosengarn et al.*, 103 Ind. 414;
Alvey v. Reed, Guardian, 115 Ind. 148;
Adams v. Buhler et al., 116 Ind. 100;
Goodbub v. The Estate of Hornung, 127 Ind.
 181;

- McNamee v. Rauck et al.*, 128 Ind. 59;
Jeffersonville, etc., Co. v. Ritter et al., 138 Ind.
 170;
Jenckes v. Jenckes et al., 145 Ind. 624;
Totten, etc., Co. v. Muncie Nail Co. et al., 148
 Ind. 372;
Union, etc., Assn. v. Helberg et al., 152 Ind.
 139;
Bird et al. v. St. John's, etc., Church, 154 Ind.
 138;
Duckwell et al. v. Jones, 156 Ind. 682;
Sulzer Machine Co. v. Rushville Water Co., 160
 Ind. 202;
Lengelsen v. McGregor et al., 162 Ind. 258;
Adamson v. Sauer et al., 3 Ind. App. 448;
Kulp et al. v. Chamberlain et al., 4 Ind. App.
 550;
Brigham v. Derrald et al., 7 Ind. App. 115;
Vorhees et al. v. Beckwell, 10 Ind. App. 224;
Bratton v. Ralph et al., 14 Ind. App. 153;
Conlee et al. v. Clark et al., 14 Ind. App. 205;
Davis, etc., Co. v. Vire et al., 15 Ind. App. 117;
Rhodes et al. v. Webb, etc., et al., 19 Ind. App.
 195;
Patton v. Matter, Trustee et al., 21 Ind. App.
 277;
Montpelier, etc., Co. et al. v. Stephenson et al.,
 22 Ind. App. 175;
Taggart v. Kem et al., 22 Ind. App. 271;
McFarlane et al. v. Foley et al., 27 Ind. App.
 484;
Roberts v. Koss et al., 32 Ind. App. 510;

Geo. B. Swift Co. et al. v. Dolle, Receiver, 39
Ind. App. 653;

Whitcomb v. Roll, 40 Ind. App. 119;

Stephens et al. v. Duffy, 41 Ind. App. 385;

Beach et al. v. Huntsman, 42 Ind. App. 205

APPENDIX B.

SO MUCH OF THE ACT OF 1883 AS AMENDED FROM TIME TO TIME AS BEARS UPON THE QUES- TIONS PRESENTED UPON THIS APPEAL.

The sections of the Act of March 6, 1883 in controversy were as follows: Sec. 1, as amended in 1899, Acts of 1899, p. 569, being Sec. 8295 of the Revised Statutes of 1908 is as follows:

Section 1. "That contractors, sub-contractors, mechanics, journeymen, laborers and all persons performing labor or furnishing material or machinery for the erection, altering, repairing or removing any house, mill manufactory or other building, bridge, reservoir, system of water works or other structure, or for constructing, altering or repairing or removing of any sidewalk, walk, stile, well drain, sewer or cistern, may have a lien separately and jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of water works or other structure, sidewalk, walk, stile, well drain sewer or cistern which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished or either; and all claims for wages for mechanics and laborers employed in or about any shop, mill, ware-room store-room, manufactory or structure, bridge, reservoir, system of water works or other structure, sidewalk, walk, stile, well, drain, sewer or cistern, shall be a first lien upon all the machinery, tools, stock of material, work finished or unfinished located in or about such shop, mill,

ware-room, store-room, manufactory or other building; bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well drain, sewer or cistern or used in the business thereof; and should the person, firm or corporation be in failing circumstances the above mentioned claim shall be preferred debts, whether claim or notice of lien has been filed or not."

Section 3 of the Act of 1883 as amended in 1889, Act of 1889 p. 258, being Sec. 8297 R. S. 1908, is as follows:

"Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after performing such labor or furnishing such materials, or machinery, or articles, or thing or consideration, or rendering such consideration described in Section 1, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory, or other building, bridge, reservoir, system of water works or other structure may stand or be connected with or to which it may be removed. Any description of the lot or land in a notice of a lien will be sufficient if, from such description, or any reference therein, the lot or land can be identified."

Section 4 of the Act of 1883, being Sec. 8298 R. S. 1908, is as follows:

"The recorder shall record the notice, when presented, in the miscellaneous record book, for which he shall receive twenty-five cents; and all liens so created shall relate to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery, and shall have priority over all liens suffered or created thereafter, except the liens of other mechanics and material men, as to which there shall be no priority."

Section 6 of the Act of 1883 as amended in 1889, Acts of 1889 p. 258, being Sec. 8299, of the Revised Statutes of 1908 is as follows:

"Any person having such lien may enforce the same by filing his complaint in the circuit or superior court of the county where the labor was performed, or the materials, machinery, articles, things or service furnished or rendered at any time within one year from the time when said notice has been received for record by the recorder of the county; or, if a credit be given, from the expiration of the credit, and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void, and the court rendering judgment shall order the sale to be made, and the officers making the sale shall sell the property without relief whatever from valuation or appraisement laws."

Section 12 of the Act of 1883 as amended in 1889 Acts of 1889, p. 259 being Sec. 8305 of the Revised Statutes of 1908 is as follows:

"All persons who shall perform work or labor in the way of grading, building embankments, making excavations for the track, building bridges, trestle-work, works of masonry, fencing or other structure, or who shall perform work of any kind in the construction or repair of any railroad, or part thereof, in this state; and all persons who shall furnish any material for any such bridge, trestle-work, work of masonry, fence or other structure, or who shall furnish any material for use in the construction or repair of any railroad, or part thereof in this state, whether such work or labor be performed, or such material furnished, in the pursuance of a contract with a railroad corporation building, repairing or owning such railroad, or whether such work or labor be performed, or material furnished, in pursuance of a contract with any person, corporation or company engaged as lessee, contractor, sub-con-

tractor or agent of such railroad corporation, in the work of constructing or repairing any such railroad or part thereof, in this state, may have a lien to the extent of the work or labor performed, or material furnished, or both, upon the right of way and franchises of such railroad corporation, within the limits of the county in which such work or labor may be performed or material may be furnished, and upon all works and structures mentioned in this section, that may be upon the right of way and franchise of such railroad corporation within the limits of such county. In case such work or labor shall be performed or material furnished in pursuance of a contract with any person, corporation or company engaged as lessee, sub-contractor or agent of any railroad corporation in the construction or repairing of any railroad, as heretofore mentioned in this section, the person performing such labor or furnishing such material shall not be required to give notice to such corporation as is required of sub-contractors, journeymen and laborers in the ninth (9) section of said act, approved March 6, 1883, in order to entitle him to acquire and hold a lien for labor performed or material furnished under the provisions of this section, but the performance of such labor, or the furnishing of such material, shall be sufficient notice to such corporation. All the provisions of said act approved March 6, 1883, in so far as they can be made applicable to this section, except that part of the ninth (9) section thereof in reference to notice, shall apply to this section, and be in aid thereof. Liens thus acquired shall be enforced as other mechanics liens are enforced in this state."

Sec. 13 of the Act of 1883, being Sec. 8306 R. S. 1908, is as follows:

"Any person desiring to acquire the lien provided for in the last preceding section, shall give notice of his intention to hold such lien by

causing a notice thereof to be recorded in the recorder's office of the proper county in the same manner, and within the same time, as above provided, for giving notice of mechanic's liens; and any person having given notice within the proper time, may enforce such lien in the same manner as mechanics' liens. Such suit must be brought within one year from the time such notice was filed in the recorder's office."

Sec. 14 of the Act of 1883 being Sec. 8307 of the Revision of the Statutes of 1908, is as follows:

"In all suits brought for the enforcement of any lien under the provisions of this act, if the plaintiff or lien holder shall recover judgment in any sum, he shall also be entitled to recover reasonable attorney's fees, which shall be entered by the court trying the same as a part of the judgment in said suit."

The constitutional provision under which the Brennan case was decided, is as follows:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. Such act shall be void only as to so much thereof as shall be expressed in the title." Constitution of Indiana, Art. 4, Sec. 19.

APPENDIX "C."

EXTRACTS FROM CONTRACTS.

PROVISIONS OF CONTRACTS TOUCHING THE QUESTION OF WAIVER.

1. The Underwriting Agreement which in Paragraph 4 of the Master's Report is said to have been executed, the Indianapolis, Crawfordsville & Western Traction Company, being party of the first part and divers individuals designated in the instrument as being subscribers, being parties of the second part; the provision being as follows:

"Each party whose name is hereto subscribed, severally undertakes and agrees to, and does hereby purchase from the Traction Company, bonds and shares from the capital stock of said company in equal amounts, par value of each, to the aggregate amount set opposite the name of such persons, at and for the price of four hundred and fifty dollars (\$450.00) with accrued interest for each thousand dollars (\$1,000) par value of such bonds and four hundred and fifty dollars (\$450) with accrued interest for each one thousand dollars (\$1,000) of stock par value, and undertakes and agrees with said Traction Company to pay the price thereof at said rate in installments as follows: Ten per centum on or before the first day of each month thereafter until full sum is paid."

In this paragraph of the report, it is not mentioned, nor is it anywhere found that Moore-Mansfield had subscribed this Underwriting Agreement.

2. The contract of February 21st, 1906, contained the following:

"1. The contractor undertakes and agrees to furnish all materials, machinery, equipment, labor, etc., to be purchased in the name of The Moore-

Mansfield Construction Company, and to construct and equip and put in operation upon a right-of-way which the Traction Company agrees to provide, according to plans and specifications to be furnished by the Traction Company, that part of the street and interurban street railway of the Traction Company, extending in and from the City of Indianapolis to and within the City of Crawfordsville; the same to be completed to the acceptance of the Engineer and the Executive Committee of the Board of Directors of the Traction Company, and to be free and clear of any claim and demand created by or against the Construction Company for which any lien has been or could be taken upon the railroad or any other property of the Traction Company, or for which said Traction Company or its railroad or any other property, has been or could be made liable. * * *

* * *

"6. Before the final settlement is made between the parties hereto for work done and materials furnished under this contract and before any right of action shall accrue to the Construction Company against the Traction Company therefor, the said Construction Company shall furnish evidence satisfactory to the Engineer of the Traction Company that the work covered by this contract is free and clear from all liens for labor or material and that no claim then exists against the same for which any lien could be enforced."

* * *

3. The contract of June 6, 1906, contains the following:

NOTE: By its terms it purports to be a contract between the Traction and Installation Companies, but it is signed by Moore-Mansfield.

(1) (Preamble.) * * * Whereas the railway company has entered into a contract with the Moore-Mansfield Construction Company, of Indianapolis, Indiana, covering the construction of the track, bridges, culverts, etc., and

whereas the railway company has duly authorized an issue of \$3,000,000 of its first mortgage * * * bonds secured by mortgage on all of its property now owned and hereafter to be acquired and has set apart for the construction and equipment of its line from the City of Indianapolis to and in the City of Crawfordsville, \$1,500,000 par value, of such bonds and \$1,500,000 par value, of its capital stock and whereas an Underwriting Agreement, dated February 21, 1906, with reference to the bonds and stock herein mentioned has been duly executed between the said railway company and certain persons mentioned in said Underwriting Agreement as the subscribers and under said agreement at the date of the execution of this contract, namely, June 6, 1906, not less than 900 bonds of par value, of \$900,000, have been in good faith subscribed for by responsible parties.

* * * * *

(CONTRACT.)

I.

(2) "The contractor (the installation company), undertakes and agrees to do all the work and furnish all the material for the construction * * * for the railway company * * *, and equipment of the pole line, overhead electrical circuits, power house and substation buildings and machinery, repair and shop and rolling stock for a single track and turn outs electric railway * * *."

II.

(3) "The railway company hereby agrees to provide the contractor with all necessary rights-

of-way, etc. * * * The contractor shall not be held responsible for work done, material furnished or repairs made by others * * *."

III.

(4) "The railway company agrees not to hinder the contractor from prosecuting the work uninterruptedly from start to finish, and agrees that that portion of the construction work which is to be done by the Moore-Mansfield Construction Company, shall be completed free from any claim of indebtedness, the holders of which, may under the laws of the State of Indiana, or of the United States, be entitled to a lien of any kind against any of the property of the railway company, so that the railway company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said railway company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana."

* * * * *

X.

(5) * * * The Railway Company shall pay the contractor \$560,000.00 " * * * The contractor agrees to accept in part payment of all material, etc., * * * to be furnished under this agreement, first mortgage * * * bonds of the railway company, to the amount of \$225,000 par value; and common stock of said railway company to the amount of \$225,000 par value; the contractor agrees to accept the above named bonds and stock in payment of \$202,500 of the contract price hereinbefore mentioned and it is agreed that to facilitate the calculation of payments due they shall

be paid approximately two-thirds in cash, one-third in bonds and stock at the rate aforesaid * * *."

XI.

(6) "The contractor shall not be required to commence work or delivery of materials under this contract, until all of the bonds of the railway company covering its line between Indianapolis and Crawfordsville, Indiana, have been signed and certified by the trustee, and the railway company shall thereupon cause to be set aside in the hands of the trustee, all of the bonds and stock to be issued to the contractor or its order under this agreement. The railway company agrees to furnish the contractor with a written statement of the trustee to the effect that the said bonds and stock have been set aside in accordance with this clause."

XIII.

(7) "The Moore-Mansfield Construction Company hereby approves all and singular the terms, agreements, provisions and conditions of this contract * * * and agrees that it will do all acts necessary to the carrying out of this agreement so far as the same relates to the More-Mansfield Construction Company * * *."

Signed by the three companies.

APR 22 1914

JAMES D. MAHER
CLERK

UNITED STATES OF AMERICA, SCT.

IN THE

Supreme Court of the United States

October Term, 1913.

File No. 23321. Term No. 358.

MOORE MANSFIELD CONSTRUCTION COMPANY,

Appellant,

v.

ELECTRICAL INSTALLATION COMPANY ET AL.,

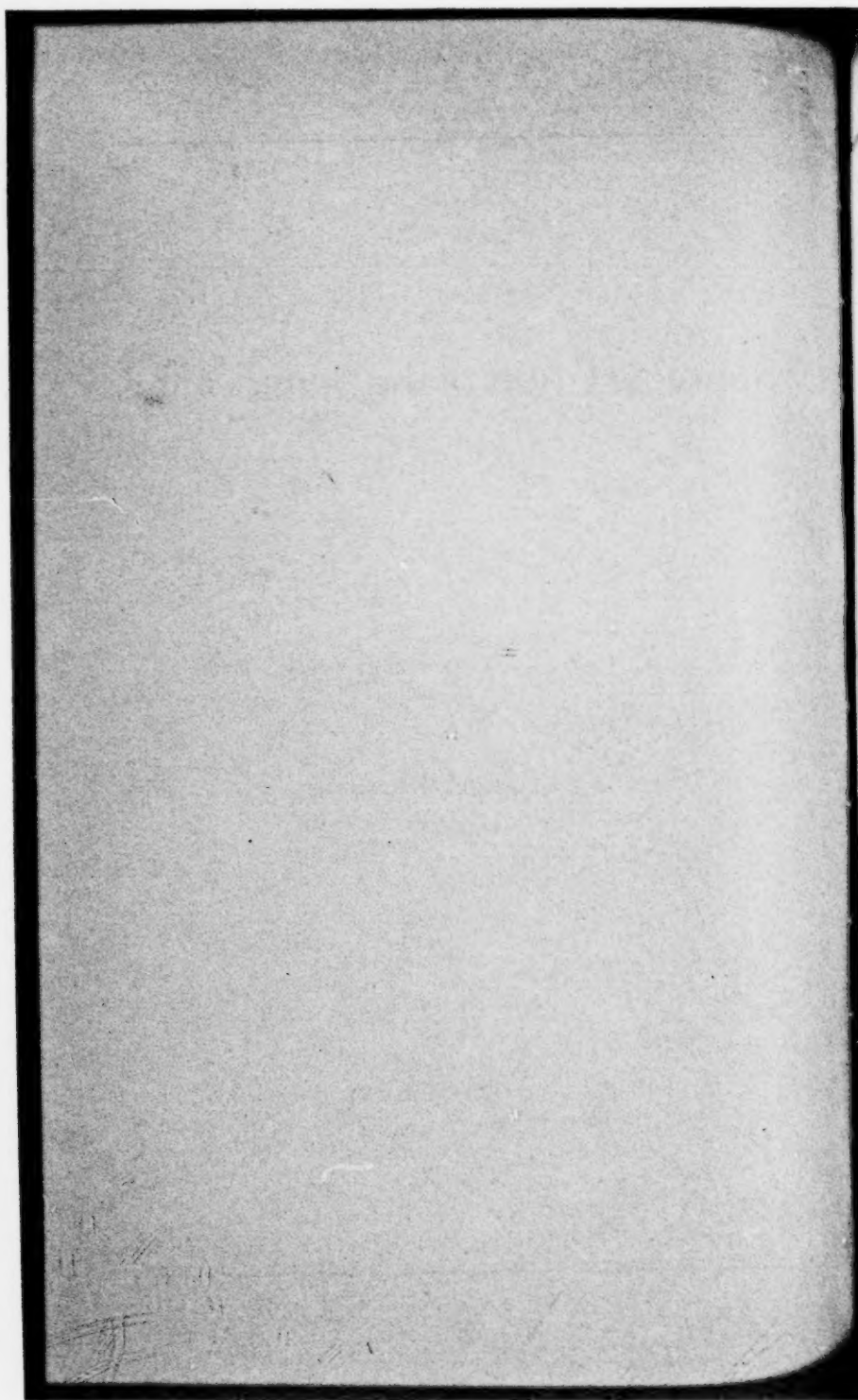
Appellees.

APPELLANT'S REPLY BRIEF.

A. S. WORTHINGTON,

WILLIAM A. KETCHAM,

Solicitors for Appellant



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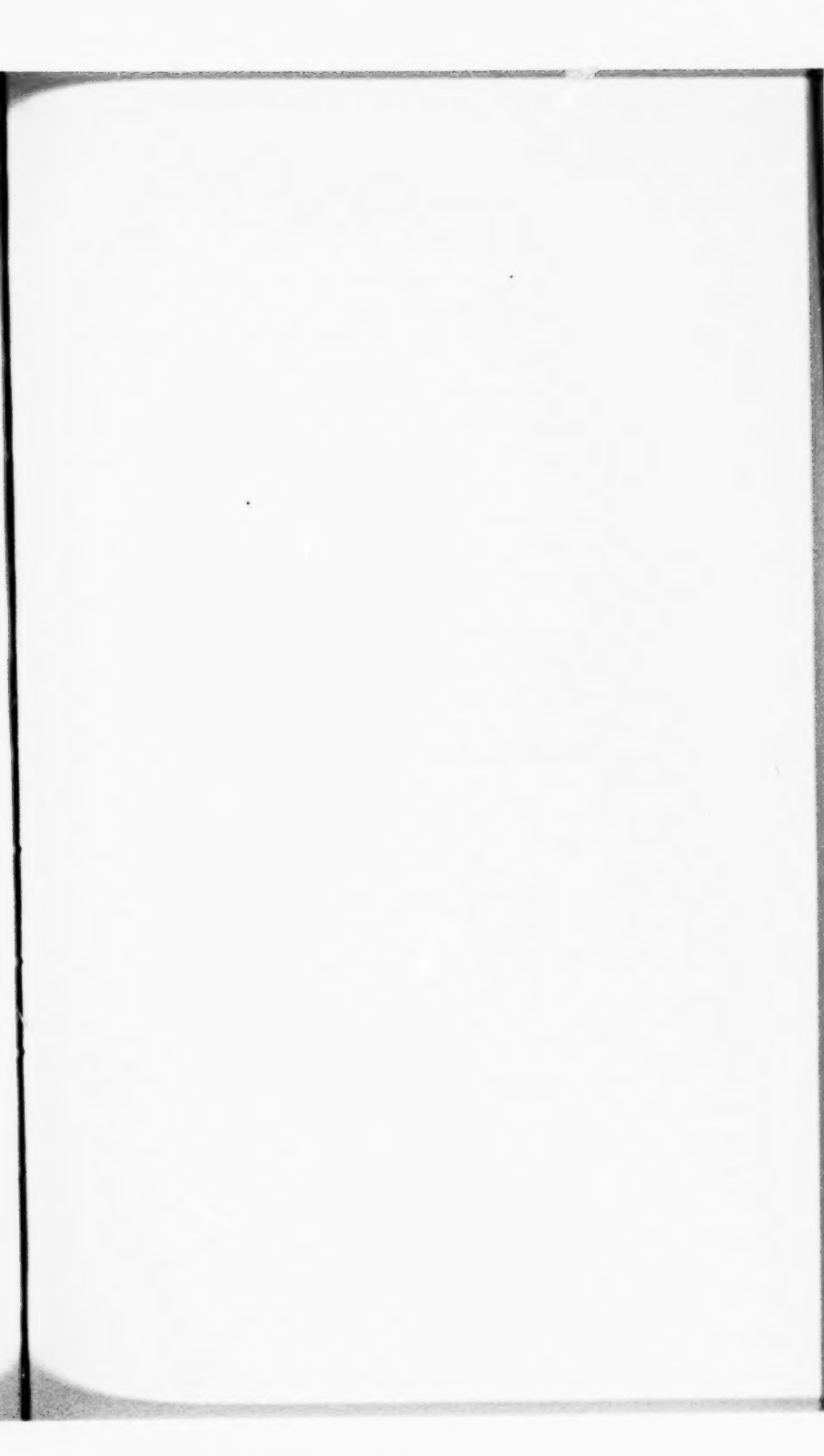
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UNITED STATES OF AMERICA, SCT.

IN THE

Supreme Court of the United States

October Term 1913.

MOORE-MANSFIELD CONSTRUCTION Co.,

Appellant,

v.

ELECTRICAL INSTALLATION Co., ET AL.,

Appellees.

File No. 23321.

Term No. 358.

APPELLANT'S REPLY BRIEF.

I.

PRELIMINARY.

(a) The appellee, the Marion Trust Company, Trustee has submitted an elaborate brief.

(b) Neither the appellee, the Electrical Installation Company, nor the Indianapolis, Crawfordsville & Western Traction Company has either submitted a brief, or united in the brief filed on behalf of the Marion Trust Company, Trustee, so that it is apparent, as stated in our original brief that neither of them is concerned with the outcome of this appeal.

So that the controversy is entirely between the appel-

lant and the appellee, the Marion Trust Company, Trustee, and it is their respective rights and priorities alone that are before this court for consideration.

(c) In considering the question of the alleged waiver supposed to be imbedded in the vitals of the underwriting agreement of February 21, 1906 and the construction contract of February 21, 1906, both contracting parties knew:

1. That the appellant was obligating itself to do work in the construction of the Traction Company's road that would cause the expenditure of between \$1,000,000.00 and \$1,100,000.00.

2. That it unquestionably obligated itself to pay and discharge all the claims that might arise, in favor of anyone other than itself that furnished materials, performed labor or invested money in the construction of the road, so as to leave the road free from any and all such liens.

3. That for all the work and labor it might perform and cause to be performed, materials that it might furnish or cause to be furnished or moneys that it might furnish in the construction of this road, it had as it then well knew under the decisions of the courts of the state for nearly three quarters of a century an absolute, complete and perfect security, that could not "get away" except by its own voluntary act, in the mechanic's lien laws of this state.

4. That even after the electrical work had by the agreement of June 6, 1906 been let to the Installation Company, appellant was still bound to do work that, together with what it had already done, would exceed in amount a half million dollars.

(P. R. 37, 43, 101, 107-8.)

5. That if a mortgage or trust deed should be executed on this unbuilt road, and bonds issued thereon, whether it was or was not described as a first mortgage the trustee and the bond holders under *Farmers, etc., Co. v. Canada, etc. Co.*, 127 Ind. 250, which had been the unquestioned law of the state for more than fifteen years before the execution of either or any of the instruments in question in this case would take their lien junior and subordinate to the liens for the work, etc., done in building the unbuilt road.

6. There was every reason why the contractor should out of the moneys he should receive from building the road or might obtain elsewhere, pay and discharge every indebtedness that it owed so that it might do and turn over a "clean job"—there was absolutely no reason or sense in its agreeing to expend this enormous amount of money without any security whatsoever and leave itself stranded, as the decision of the court below left it not only without security but without the right to make a claim of unpaid indebtedness for the amount that still remained unpaid.

In this connection it is not out of place to point out with precision that the court did not decide the case upon the question of waiver (although as pointed out in our original brief the court refused to put its decree so as to make it definite and certain, whether it was based on the question of waiver or on the constitutional question).

An examination of the decree makes it certain that the court did not decide against appellant on the question of waiver and we desire to briefly call the attention of this court to the condition of the record on that point.

Appellant's cross-bill (Ex. A. A. P. R. pp. 39-45), and

the Master's Report (Par. VIII, pp. 125-135), sets out *in extenso* the contract of June 6, 1906, in paragraph III of which (printed record, page 41 and page 127) is contained the following language in addition to what is said in regard to liens:

"The Railway Company agrees * * * that that portion of the work which is to be done by the Moore-Mansfield Construction Company, shall be completed * * * so that the Railway Company's issue of first mortgage bonds herein mentioned **SHALL BE THE ONLY INDEBTEDNESS AGAINST SAID RAILWAY COMPANY UPON THE COMPLETION OF THE CONSTRUCTION AND EQUIPMENT OF ITS LINE BETWEEN INDIANAPOLIS AND CRAWFORDS VILLE, INDIANA.**"

It will be noted that in part pay for its work the Installation Company (P. R. pp. 43 and 129), was to receive \$225,000.00 of the common stock of the Traction Company, and was thereupon not only interested that there should be no liens, but that there should be no outstanding indebtedness of any kind to impair or lessen the value of its common stock. The agreement in regard to the liens and the outstanding indebtedness stand side by side as an essential part of Par. X of the contract of June 6, 1906, and if by force of language (the Moore-Mansfield Company did not make this stipulation but did assent to the instrument itself), as to what the Traction Company was to do, the Moore-Mansfield Company is held to have waived a right to take or retain a lien, by the same language, it had waived all right to claim an indebtedness in its favor, no matter whether it was paid or not, and when the court decreed, as it did, in Par. Eighth of the decree (P. R. p. 160), a judgment in favor of appellant for \$27,406.09, but that it "is not entitled to a mechanic's lien * * * and that no such lien exists," it is a complete demonstration, that

it was decreed to have no lien not because of any supposed waiver, but because under the decisions of the Supreme Court of Indiana in the Brennan and Yarnelle cases, the appellant combining in its own proper person at the same time those obnoxious elements of a contractor and a corporation it could not under the Constitution of Indiana take or enforce a mechanic's lien.

In this connection while on the subject of waiver it is proper to point out:

(a) That while the appellant in all the work it did, as found by the master specifically in Par. XIII of his report (P. R. p. 138), relied upon its right to take and enforce a mechanic's lien "and that but for that knowledge and information it would not have so contracted or furnished the materials or performed the labor which it agreed to do."

Obviously in the face of this finding—to which there was no exception, nor to the evidence on which it was based—it would be impossible to say that it *intended* to waive a lien; whether as a matter of law it must be conclusively held to have waived its right, we will discuss *post* under the appropriate head of appellees' contention.

(b) The Trustee cannot be heard to say that it accepted the trust deed or that the bonds were sold in reliance upon any supposed waiver for in its answer filed on the 29th of January, 1910, nearly four years after the execution of the contract of February 21, 1906; three and a half years after the execution of the contract of June 6th; seven and a half months after the bill was filed in this case; seventeen months after appellant filed its complaint in the Superior Court of Marion County, Indiana against the Marion Trust Company, Trustee,—among others—to enforce its mechanic's lien, Par. XI of the Master's Report (P. R. p. 135), eight weeks after appellant had by leave of court

filed its cross-bill in this action, the Trustee filed its answer to appellant's cross-bill, in which it formally alleged (Par. II of its answer, P. R. p. 187), "but this cross-complainant has no absolute knowledge and is not sufficiently advised as to the terms of said agreement to state whether Exhibit 'A' filed with said cross-complaint is a copy thereof or not, nor what the exact terms and conditions of said contract were, etc," and with respect to the contract of June 6, 1906, it formally alleged (Par. III of its answer, P. R. p. 87), it "is not sufficiently advised to enable it to state whether or not on the 6th day of June said defendant, Traction Company, with the knowledge and consent of said cross-complainant entered into a contract with the Electrical Installation Company, etc., * * * all as alleged in Par. III of said cross-bill of complaint and being insufficiently and inadequately advised as to the terms of said arrangement so referred to in said Par. III of said cross-bill and as to the respective rights and obligations of the parties thereto arising thereunder, etc."—the contract of June 6th was set forth in *haec verba* as Ex. A. A., to said cross-bill (P. R. pp. 39-45), and these two contracts of February 21st and June 6th, constitute the only shred or tatter of a claim that appellant had by contract waived its right to a mechanic's lien.

It is true that four days later the Trust Company, having had an accession of information, by an amendment to Par. VI of its answer, alleged that by Pars. III and XIII of the contract of June 6, 1906, appellant had waived its right to a mechanic's lien, but it is not alleged in the answer nor was it attempted to be brought into the Master's Report that the trust deed was accepted by the Trustee or the bonds sold in reliance upon the supposed waiver, as indeed how could it have been either alleged or shown when

it was formally admitted and alleged that as late as January 29th, the Trustee and its bondholders for whom it acted had no knowledge whatever on the subject and no "information sufficient to form a belief."

Information and belief on the part of the lien claimant; lack of information and belief on the part of him who denies the lien do not establish "how firm a foundation" for an estoppel and yet that is just where the pleadings, the report and the decree leave the appellee with respect to its claim of waiver of a right, to waive which was under the circumstances an idiocy that ought not to be attributed to anyone unless it had the power of dynamite behind it.

While the litigation was pending, the Installation and the Traction Companies were actively defending against the appellant (P. R. pp. 99 and 106), and the Trustee (Original Tr. pp. 286 and 310). Since the decree in favor of the Trustee for \$1,752,907.78 and costs on a forty-five mile traction line from Indianapolis to Crawfordsville (P. R. p. 158), "the subsequent proceedings interested them no more."

With these preliminary suggestions we come now to the discussion of appellees' propositions, six in number. Somewhat varied, in order to make them more nearly conform to the legal issues between us they are with reference to the pages of the brief where stated and discussed as follows:

II.

APPELLEES' LEGAL PROPOSITIONS.

1. The contracts—February 21st, June 6th—and the under writing agreement constituted an express waiver of the right in appellant to take a mechanic's lien, to the end that the trust deed should constitute the first lien.

(Appellees' Brief, p. 4 and pp. 6-13.)

2. The master having reported the contracts claimed by appellee to constitute a waiver, there was nothing for the court to do, except to decree a waiver as a matter of law; and this without any exception, the reference to the master being only to ascertain and report the facts;—and this wholly without reference to the masters finding of fact in Par. XIII, of his report that the appellant built the road (in part), relying on its right to be secured by a mechanic's lien.

(Appellees' Brief, p. 4 and pp. 13-27.)

3. The Mechanic's Lien Law of 1883.

(a) Does not apply to contractors.

(b) and if it does it is unconstitutional as in violation of Sec. 19 of Art. IV of the Indiana Constitution.

(Appellees' Brief, pp. 4-5 and pp. 28-9.)

4. When the work in controversy was performed there was no statute in force in Indiana entitling a corporation to enforce, to assert or to maintain a lien.

(Appellees' Brief, p. 5 and pp. 30-2.)

5. A mechanic's lien is a mere remedy, and even if as interpreted at the time the contract in suit was executed, it authorized corporations, contractors and subcontractors to enforce liens, no provision of the Constitution of the United States was violated in taking away or destroying

that remedy. This contention, as made and insisted upon in the brief would apply precisely as well to an express repeal or amendment of the lien act as to a change in judicial construction.

(Appellees' Brief, p. 5 and pp. 32-45.)

6. At the time this case was decided by the court below, it did so relying upon the latest decisions by the Supreme Court of Indiana, and although those decisions have since been overruled, this court should not follow the latest decision of the State Supreme Court, because:

(a) The decision of the Circuit Court was not erroneous when rendered.

(b) This court will, when the decisions of the state court are conflicting exercise an independent judgment and the decision of the court below being right, as well as in harmony with the last declaration of the state court, should be affirmed;—by this it is evidently not intended to say the *last* declaration of the Supreme Court of Indiana, for if so, there would be no escape from a reversal on the authority of *Moore-Mansfield, etc. v. Indianapolis, etc., Co. et al.*, 179 Ind. 356;—(what the writer intended to contend for was “the last declaration of the Supreme Court of Indiana prior to the decision of this case in the court below and we shall so discuss it in this brief).

(Appellees' Brief, p. 5 and pp. 46-8.)

The persevering and indefatigable industry that has resulted in unearthing from the recesses of text books, Shepard's Citations, the Citator, A. & E. E. L., Cyc. and the Century Digest, all the cases cited referring to the questions, if only they do not appear at a glance not to be against appellees' claim is to be commended, but it results in making the labor of an intelligent analysis

of the cases themselves quite a protracted one with the result of making a reply brief that only in name.

In the hope of lightening the labor of this court we have attempted as briefly as possible to present that analysis.

With these preliminary observations we now turn our attention to the specific propositions, six in all, insisted upon by appellees' learned counsel.

III.

THE CLAIM OF WAIVER.

(APPELLEES' POINT 1.)

In support of its first proposition, appellee has cited:

- Sheid v. Rapp*, 121 Penn. St. 193;
- Long v. Caffery*, 93 Pa. St. 526;
- Schroeder v. Galland*, 134 Id. 277;
- Com., etc., Co. v. Ellis*, 192 Id. 321;
- Stoneback v. Waters*, 198 Id. 459;
- Pennock v. Locust, etc., Co.*, 224 Id. 437;
- Burger v. F. R. Moss, etc., Co.*, 225 Id. 400;
- Grant v. Strong*, 18 Wall. 624;
- Matthew v. Young*, 40 N. Y. Sup. 26;
- Brzezinski v. Neeves*, 93 Wis. 567;
- Cushing v. Hurley*, 127 N. W. 441;
- Ludowici, etc., Co. v. Pa. Inst., etc.*, 116 Fed. 661;
- Sprague v. Providence, etc., Co.*, 163 Id. 449;
- Gray v. Jones*, 81 Pac. 813;
- Bowen v. Aubrey*, 22 Cal. 596 (566);
- Geo. B. Swift Co. v. Dolle*, 39 Ind. App. 653;
- McHenry v. Knickerbacker*, 128 Ind. 77;

Clawson v. Billman, 161 Ind. 610;

Miller v. Decker (Taggart), 36 Ind. App. 595;

Kneeland's Mechanic's Lines, Secs. 136-7.

As to these several cases we beg to suggest:

(a) That in our original brief we have already sufficiently discussed the Indiana cases cited and that there is nothing in appellees' brief to call for further attention to these cases upon the point to which they are cited.

(b) That neither in the brief nor in the cases cited by appellee is there anything that weakens or disparages the propositions in our original brief at pages 65-7, that, 1. "To constitute a waiver of a mechanic's lien it should be so plain that every mechanic or material man though of limited education can understand it at a glance and not be compelled to submit its interpretation to a lawyer with the risk of a decision against him in the court of last resort." 2. In order to prevent a contractor from filing a lien there must be an express covenant against liens or a covenant resulting as a necessary implication from the language employed and that the implied covenant should so clearly appear that the mechanic or material man can understand it without consulting a lawyer as to its legal effect. 3. If the contract is fairly and reasonably susceptible of any other construction it will not be construed as waiving the contractor's right to a lien.

(c) That the case of *Nice v. Walker*, 153 Pa. St. 123, having been decided subsequently to the cases in 93d, 121st, 134th Pa. St., anything that may have been said in those cases or either of them, inconsistent with the holding in *Nice v. Walker*, must be deemed to have been withdrawn.

(d) That in none of the Pennsylvania cases subsequent

to *Nice v. Walker*, is there any reference to *Nice v. Walker*, tending to discredit it as an authority.

(c) *Grant v. Strong*:

In *Grant v. Strong*, 18 Wallace 623, it was held that a builders lien did not attach where the builder took a real security for the payment of the work which he was to do and afterwards the work being all done, gave it up and took a mere note. Mr. Justice Miller saying at pp. 624-5:

"The question whether a lien is obtained or is displaced when it once attaches is largely a matter of intention to be inferred from the acts of the parties and all the surrounding circumstances * * * in our view the decision of the case must rest on the written agreements * * * and from them we are forced to the conclusion that the appellee always relied wholly upon other securities than a mechanic's lien for his pay, which he deemed sufficient and which he voluntarily agreed to surrender. * * * Under the first contract, * * * under which the larger part of the work was done, he was to take his pay, not in money, but in the lot on which one of the houses was built, and that to secure the completion by Grant, of the sale, when the work was done the deed was made and placed * * * (in escrow). Under these circumstances no lien could accrue for the work on that or on the other buildings. When the second contract * * * was made Strong did not give up this security, but still retained and relied on it and it was made a part of the new contract, that the escrow * * * should be in full force until the work was completed, measured and the sum due on it, paid by the promissory note of Grant."

The note it seems was a negotiable promissory note. With reference to this, Mr. Justice Miller says at p. 625:

"Now, with this security in Totten's hands during all the time the work was going on, looked to and relied upon by Strong, how can it be said that Strong relied upon a mechanic's lien, or that Grant intended in addition to that deed for one lot, to allow Strong to obtain a lien upon all the others? And so much reliance was placed on this escrow by Strong, that only after all was settled, the work

measured and paid for, as the parties had stipulated by Grant's note, did Strong sign the order for the delivery to Grant of the deed. During this time all the facts repel the idea of a lien.

We do not think that the giving up of the escrow, and the taking of the note in its place, according to the terms of an agreement previously made, and which obviously did not look to a mechanic's lien as part of the transaction, would create a lien where none existed before.

In short, we are of opinion that these agreements show an acceptance and reliance by Strong on another and very different security for the payment of his work, inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case."

(f) In *Jones et al. v. Great Southern, etc., Co.*, 86 Fed. 370, reversing the same case in 79 Fed. 477, in an opinion by Judge Lurton (now Mr. Justice Lurton of this court) it was said at page 377, *et seq*:

"The state of the decisions in Pennsylvania is quite peculiar * * * by the later Acts of 1836 and 1845, it was provided that a lien should exist in favor of all debts contracted by the owner or contractor for labor or materials. This legislation was upheld upon the theory that the contractor was by implication made the agent of the owner to fasten a lien upon the building and the owner's land for debts contracted for labor and materials." (Citing authorities.) "And it was pointed out at page 378, that it had been 'held in *Schroeder v. Galland*, 134 Pa. St. 277 (19 Atl. 632), that a subcontractor or material man could have no right against the owner not founded on the contract between the owner and his contractor. That the agency of the owner was special and limited by his contract of which all who gave him credit must take notice and that if he contracted that neither himself nor any other should have a lien none could be claimed by subcontractors or others."

It was further pointed out that it had been held in *Taylor v. Murphy*, "that a stipulation by the contractor, that he 'will release and discharge the said houses from the operation of all liens,' etc.," was not a waiver of the right

to enter a lien or a covenant that none should be entered, but only a personal undertaking on the part of the contractor to settle any liens that might be filed before demanding payment of the balance due upon his contract and that therefore subcontractors had acquired valid liens. To meet the ruling in *Schroeder v. Galland*, and cases following it, the Act of 1891 was passed. That act provided that the owner should make no contract with the contractor which should operate to defeat the rights of subcontractors and material men to file liens and that all subcontractors should have a lien notwithstanding any stipulation to the contrary in the contract between the contractor and owner unless consented to in writing by such subcontractor.

In *Waters v. Wolf*, 162 Pa. St. 153 (1894), a lien was asserted by a subcontractor who had not consented to a stipulation by which the contractor was to neither have nor create any lien in favor of others. The court in an elaborate opinion held the Act of 1891 invalid as an unauthorized restraint upon the right of "acquiring, possessing and protecting property" and not "within the delegated powers of the legislature * * *."

"Certainly the Pennsylvania decisions give no support to the decisions of the Ohio Court that the Ohio Act is void. Under the settled line of decisions in Pennsylvania, the Ohio Act is valid. In the last Pennsylvania case that of *Waters v. Wolf*, * * * the court announces its adherence to the long line of decisions upholding just such a statute as the Ohio Act involved here, saying, "In the absence of an express contract against liens with the statute before him giving a lien to those with whom he contracted, the consent of the owner, that a remedy given by law should be enforced under the contract was certainly

to be implied." In all or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or building of an owner. These statutes vary in their character and purpose. Originally they were chiefly acts giving a lien to persons having direct contractual relations with the owner. Such statutes did not protect those who contributed to the improvement through dealings with the contractor and were soon followed by statutes extending the liens to persons not contractually connected with the owner but who furnished labor or materials for the building through contracts with the principal contractor. This was accomplished in two ways: (1) By giving creditors of the contractor a derivative lien * * *. (2) Or by statutes which gave to those who furnish such labor or materials to the contractor a direct or independent lien * * *.

Some of these statutes sought to diminish the severity of this legislation by limiting the aggregate of such liens to the original contract price." (This was not the case in Indiana—*Barker v. Buell*), and the court concludes on page 389:

"The right of him who by labor and materials had contributed to the betterment of another's estate was an imperfect right because it had not been done at the instance of the owner though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors and has turned the imperfect into a perfect right by prescribing the consequences of a building contract and giving a remedy to all who at the instance of the contractor shall contribute to the performance of his contract with the owner."

Judgment was reversed with instructions to overrule

the demurrer to the bill and proceed further. From this decision there was an appeal to the Supreme Court of the United States.

Great Southern, etc., Co. v. Jones, 177 U. S. 449 (1900), in which the judgment of the court below was dismissed for lack of jurisdiction, it not appearing that there was the requisite diverse citizenship, but with a direction that "under the circumstances the plaintiffs should be allowed upon application to amend the bill upon the subject of the citizenship of the parties. If the amendment shows the case within the jurisdiction of the Circuit Court the parties should be permitted to proceed to a final hearing otherwise the bill should be dismissed at the plaintiff's costs without prejudice to another suit in a court of competent jurisdiction." After its return to the Circuit Court it again found its way to the C. C. A. in 116 Fed. 793 (1902), where it was held that the Mechanic's Lien Act of April 13, 1894, giving independent liens to subcontractors was not invalid and the judgment of the Circuit Court was affirmed and this in turn was affirmed in *Great Southern, etc., Co. v. Jones*, 193 U. S. 532 (1904).

(g) Kneeland's Mechanic's Liens.

In Kneeland's Mechanic's Liens, 2nd Edition, it is said in Secs. 136-7:

Sec. 136. The express stipulation against liens will effect not only the contractor but all persons acting under him or depending on the original contract.

Sec. 137. There is no substantial equity in the plea by a subcontractor of want of knowledge of the conditions of the original contract. "it may be stated therefore that when the original contract has by express agreement waived his right to file and enforce a lien upon property neither he nor any person acting under him can there-

after claim or assert such a lien," but that is immediately followed by Sec. 138, "a mechanic's lien although a security by act of law is governed by the principles applicable to securities by the act of parties. But as it is expressly created by law for a full security to the mechanic it ought not to be considered as waived or released except by plain facts denoting an intention on the part of the lienor to abandon his rights under the statute * * *."

(h) Explicit language from cases cited, viz:

1. In *Brzezinski v. Neeves et al.*, 67 N. W. 1125 (1896), the language of the contract was:

"It is further agreed that the said party of the first part (contractor), hereby waives all right of lien upon the premises which he may have by virtue of the statutes of the State of Wisconsin, and that all persons employed by him to work upon said premises shall sign, execute and deliver a release and waiver of all liens which they may be entitled to under the statutes of this state and that the waiver of liens hereto attached and made a part hereof shall be signed and executed by all persons employed by the party of the first part under this contract. The waiver of such liens being the essence of this contract and a part of the consideration for entering into the same by the parties of the second part."

Held that this was an express waiver.

2. In *Mathews v. Young et al.*, 40 N. Y. Supp. 26, the language of the contract was:

"It is also agreed and expressly understood that the party of the first part (the contractor), shall file or place no liens on the above described buildings for work herein contracted for."

Of this the court said: "This is a plain, * * * covenant; one which the plaintiff had the right to make and all interested parties may demand of him its strict observance and as a matter of law the plaintiff never had any lien as provided by the statute in his favor against the defendant Young * * *. The statutory provision allowing a contractor to place a lien on buildings upon which he

has done work as a security for his payment is clearly intended to protect the contractor against the insolvency of the owner or his neglect to pay the contractor for his work and labor according to the terms of the agreement. The rule that a party may release a statutory remedy created for his benefit and to protect him in his rights has been frequently applied and enforced where a contractor or material man has waived his right to resort to the statutory provisions allowing a mechanic's lien to be placed on the property."

3. *Long v. Caffrey*, 93 Pa. St. 526.

In *Long v. Caffrey*, 93 Pa. St. 526, the agreement was as follows:

"No mechanic's or other liens shall be entered against said building by the said Long (the contractor), or the material contractor or workman." There was no occasion for a construction here, the language was plain, clear, unmistakable.

4. *Stoneback v. Waters*, 198 Pa. St. 459.

In *Stoneback v. Waters et al.*, 48 Atl. 296 (1901), the contractor by the fourth clause of his contract had "waived all right to any mechanic's claim or lien against the premises mentioned therein and agreed not to file any such claim or lien and further agreed for his heirs * * * to sign a full, complete and absolute release of all liens, claims or demands whatsoever against said premises for work done or materials furnished therefor under this contract when thereto requested by the said party of the second part" * * *. Held, the clause aforesaid was a bar to Stoneback's claim of lien.

5. *Bowen v. Aubrey*, 22 Cal. 596.

In *Bowen v. Aubrey*, 22 Cal. 596, the contractor had agreed:

1. "That he will not incumber or suffer to be incumbered * * * by any mechanic's lien or debts of

material labor men, contractors, sub-contractors or otherwise." (P. 598.)

2. Not to sublet any part of the work without the written permission of the owner. Craft, a subcontractor sought to enforce a lien; no written permission for this subletting appears to have been given; Bowen furnished to Aubrey the contractor materials and sought to enforce a lien therefor; Craft intervened and sought to enforce a lien. Bowen's claim was dismissed and a decree entered in favor of Craft. In the pleadings Craft admitted that he knew that Aubrey had agreed to erect the building but denied that he had any notice of the conditions of the contract or that Aubrey "had contracted not to sublet." He does not deny that he knew of the agreement in Aubrey's contract that no liens were to be filed.

Held: 1. All subcontractors and material men are held to knowledge of the original contract and to act in subordination to it.

2. The owner of the property cannot be held liable or bound to any extent beyond the terms of the original contract or such new or further contract as he may make with the original contractor or the subcontractors.

3. Craft has no higher rights than the original contractor.

4. The original contractor * * * having by express agreement waived the right given him by the statute to file and enforce a lien * * * could not maintain any such lien.

5. A party may always waive a right created by statute for his benefit the same as any other.

6. The contractor having waived the right, his subcontractor cannot claim any such right.

6. *Pennock v. Locust, etc. Co.*, 224 Pa. St. 437.

In *Pennock v. Locust, etc., Co. et al.*, 73 Atl. 930 (1909), the question arose under the mechanic's lien act of June 4, 1901, (P. L. 431), and the question is stated to be:

"Whether a subcontractor whose agreement to furnish material and labor is made after a conveyance to a new purchaser is bound by the contract between the original owner and the contractor filed of record and containing a waiver of liens. The owner at the time the building contract was entered into in order to protect himself against liens caused to be inserted therein a waiver clause and then filed this agreement in writing of record. Subsequently and while the building was being constructed the owner conveyed the property to the appellee, the present owner. The contention of appellant is that under these circumstances appellee cannot claim the protection of the waiver clause in the building contract. * * * In the case at bar there was no new contract. The building was erected * * * under the original contract. The rights and duties of the parties were fixed by that contract. The material and labor were furnished under that contract. The notice as to the waiver of liens filed of record bound everyone who furnished materials or labor under the contract."

* * * * *

7. *Commonwealth, etc. v. Ellis*, 43 Atl. 1034 (1899).

The 10th clause of the contract is in the following words: "It is hereby further agreed that there shall be no liens entered or filed by any subcontractors or any other person for or on account of any work, labor or materials done or supplied in or upon said building' that these words are a prohibition against any liens is established by all our decisions from *Schroeder v. Galland*, * * * 19 Atl. 632, to this time. The learned court below held that they excluded subcontractors but for reasons set forth in the opinion they did not exclude the principal contractor. We are not able to agree to this conclusion. It seems clear to us that the words 'or any other persons,' include all other persons and necessarily include the principal contractor as the words are generic and necessarily include all persons who have a right to file liens. Moreover we think it quite plain that the

words of the 3rd section are consistent with the theory of a mere protection against possible liens and are therefore not repugnant to the positive prohibition contained in the 10th clause. All this we held in *Morris v. Ross (supra)*, but if this is so the principal contractor has no more right to file a lien than any subcontractor. The 10th section is in words that are written as contradistinguished from the other words of the contract which are printed words in a printed blank and the 10th section is the last utterance of the contract on this subject and if there were repugnance between the 3rd and 10th sections, the 10th would prevail."

The language of the 3rd section is not given and *Nice v. Walker* is not alluded to in the opinion.

8. *Burger v. F. R. Moss, etc. Co.*, 225 Pa. St. 400.

In *Burger v. F. R. Moss, etc. Co. et al.*, 74 Atl. 219 (1909), the contract provided "that no lien or claim of mechanics or material men or of any other nature whatsoever shall be filed by anyone whatsoever excluding the contractor himself * * * or any subcontractor or material men against the building herein mentioned." * * *

The contention was that the words "excluding the contractor himself," permitted the contractor to file a lien. Of this the court said at page 221:

"The statute authorizes any person furnishing labor or materials * * * to file a claim and the purpose of the contract provided by the act of (1901) is to protect the owner against such claim. The contract between the contractor and the owner does not prevent the filing of a claim by a subcontractor unless he has notice of the contract. This notice may be actual or it may be constructively given by filing a copy of the contract * * * in the * * * office. If it is filed in that office within the statutory period all parties furnishing labor or material * * * must take notice of its provisions and are bound by them. It is notice of the agreement of the contractor and not of the owner, that no claim shall be filed, that prevents a subcontractor from filing the claim.

* * * The agreement in the case at bar * * * was a separate contract by which the contractor exercised his statutory right to agree that no claim should be filed against the property."

9. *Cushing v. Hurley et al.*

In *Cushing et al. v. Hurley et al.*, (Minn.), 127 Northwestern 441, (1910). A trust agreement had been entered into for the benefit of creditors under which the debtor conveyed his property to trustees to be sold and the proceeds applied in the payment of debts. The creditors in accepting the same agreed: "* * * Not * * * to take any steps or proceedings in court or otherwise to collect or enforce the debts owing to them or either or any of them," and it was held that this constituted a waiver of the right to perfect mechanic's liens against property involved in the trust upon claims for which such liens might have been perfected but for the trust agreement.

10. *Sprague v. Provident, etc. Co.*

In *Sprague v. Provident, etc., Co.*, 163 Fed. 449: The contract contained the following stipulation: The contractors to turn the building fully completed over to the owner the contractors waiving "all rights as contractors or otherwise to any liens upon said building as against the bonds issued by said building company or the mortgage securing the same," and that such stipulation should operate in favor of any person or corporation loaning money on the security of the bonds. It was said by the court at page 453: "It is not contended that this contract did not create a waiver of the right to a mechanic's lien nor could such contention well be made," and it is difficult to see how it could. It was contended however, that this waiver was contingent upon the application of the contractors claims to the special rebate fund and that

this had been misappropriated and that the result of this misappropriation of the special security set aside for the payment of appellants demands was an abrogation of the waiver of the lien and restored appellant to all rights of liens existing in the absence of such waiver and of this it is said at page 453: "It may be conceded that such misappropriation if established would abrogate the waiver in whole or in part" * * * but it further says "that an examination of the record fails to satisfy us that there was a misappropriation of which Ellis & Co. (contractor), can complain."

Gray v. Jones et al., 81 Pac. 813, presents the only case not in harmony with our contention here and the decision of *Nice v. Walker*. In that case the language of the contract was that the contractor would save the defendant "free and harmless from the payment of any and all liens which may be enforced on account of any material furnished or labor performed on said building and premises or any part of either thereof and the said party of the 2nd part further covenants and agrees that he will not allow any laborer's, mechanic's, material man's or any lien or liens to be filed against the said building and premises or any part of either thereof, and further that the said building and premises and every part of either thereof shall be at all times free from any and all liens."

"The defendant paid the contract price in full and \$1,465.16—the contract price being \$4,150—on the extra work which he claims is a fair and reasonable value for all that was ordered or requested by him or done by his authority. The plaintiff filed a mechanic's lien on the building for \$1,117.05, the balance alleged to be due him and subsequently brought this suit to foreclose it. The defendant pleads among other matters the covenant in the contract against liens as a bar to this suit and the effect of such covenant is the only question necessary to consider on this appeal."

Of this situation the court says: "The statute * * * giving a mechanic, laborer, material man or contractor

performing labor upon or furnishing material to be used in the construction of a building a lien on such building for the labor done or material furnished confers a privilege upon the persons named which they may waive and any contract or agreement inconsistent with the existence of the lien is deemed such a waiver." * * * "Thus a surety on the contractor's bond to protect a building against liens cannot himself enforce a lien for materials furnished by him unless he has been released from his obligation by the owner because it would be inconsistent with his contract for him to do so. So too, a covenant of a contractor to keep a building free from liens is a waiver of the right to file or cause to be filed a claim for lien in his own favor." (Citing among others, *Sheid v. Rapp*, *Long v. Caffrey*, *Taylor v. Murphy*, but not citing *Nice v. Walker*, where all these Pennsylvania authorities were carefully considered and the rule established and not citing any of the later Pennsylvania authorities cited at page 67 of our original brief and the court adds: "Now the covenant of the plaintiff is that he will not allow 'any lien or liens to be filed and that the said building and premises and every part of either thereof shall be at all times free from any and all liens' and under the authorities cited this constitutes a waiver of his right to file a lien." And concludes "And as the plaintiff's contract is a waiver of his right to file a lien, it follows that the decree must be reversed and the complaint dismissed and it is so ordered."

This case, we submit, is against the great weight of authority and while it is upheld by the Pennsylvania authorities to which it refers those authorities had been themselves discredited in Pennsylvania long before they were cited.

In each of these cases except *Gray v. Jones* the language as to waiver was plain, clear and explicit and needed no

construction. They were with that single exception each and every one within the express requirement of a waiver as pointed out at pages 65-7 in our original brief.

1. The language in the case at bar, considered in and of itself wholly without reference to the finding of the Master (Par. XIII P. R. 138, p. 66 of our original brief) requires a high order of ingenuity to torture into an intention to waive a lien. As said by Mr. Justice Miller in *Grant v. Strong, supra*, at p. 634:

"The question whether a lien is obtained or is displaced when it once attaches is largely a matter of intention to be inferred from the acts of the parties and all surrounding circumstances."

If it built the road to cost over a million dollars it had in the statute of the state ample security to secure payment, for its work. The Traction Company would know through its engineers during the progress of the work how much was being done on the railroad whether by the contractor, his laborers, subcontractors and material men and therefore how much was to be paid from time to time on the work on monthly estimates. The contractor was bound by the contract to do the work and pay all the bills, so that no liens might be taken on the road by any person to whom he had become indebted for the work and labor done or materials furnished. Who these might be and what might become owing to them the contractor of necessity knew. The Traction Company could not by possibility know and it was an entirely reasonable requirement that the contractor should pay all their bills, which might be contracted by it or against it, on account of the work which it was doing so that none of them should be permitted to ripen into a lien.

It knew as the Traction Company could not possibly know who these parties were, who might, if their claims were not paid, file liens.

When the final settlement was to be made under paragraph 6 the Construction Company having knowledge, as the Traction had not and could not have, of the parties and the amounts due them, who if their claims were unpaid by the contractor who employed them and became indebted to them could file liens and so the contractor by paragraph 6 was required to make a showing satisfactory to the engineer of the Traction Company that the work covered by the contract was free and clear from all debts for labor and material and that no claim then existed for which a lien could be enforced. This the contractor knew and the Traction Company could not know except as it was shown to the satisfaction of its engineer.

But what was due to the contractor itself was not, as was the other, exclusively within its knowledge. The Traction Company made the estimates from time to time and it knew precisely as well as the contractor what these estimates amounted to; what amount had been paid and consequently what amount remained unpaid and the Traction Company needed no information on the subject. It already knew and all it had to do was to pay the balance due and owing and thus keep the property free from any lien in favor of the contractor.

To require the contractor to pay the indebtedness that it had contracted so as to keep the property free from this assertion of liens by parties with whom the contractor had had dealings by which any claim or demand by or against it might be asserted was an entirely reasonable and proper requirement protecting each and both of the contracting parties.

To construe it as requiring that the contractor had bound itself to pay all claims and charges but to itself remain unpaid and to give up without payment the absolute

security that the statute conferred upon it, would not only not be reasonable; it would be a most extraordinary requirement and one that no court should impute unless the language of the instrument was clear, precise and unmistakable.

2. The contract of June 6th, still independent of the fact reported by the Master in Paragraph XIII, *supra*, is still less satisfactory—if possible—as to a waiver of the right of the contractor to take and retain a lien.

It had already been at work from March 26; had received one estimate and the second was about due.

The Traction Company was with the assent of the contractor, contracting with the Installation Company, and their respective agreements were being reduced to writing.

By Paragraph XIII our original brief, p. 82, the contractor aproved the contract and “agrees that it will do all acts necessary to the carrying out of this agreement so far as the same relates to the Moore-Mansfield Construction Company.”

For what *it* was to do we are remitted to the body of the contract and there is nothing in the body of the contract except the language in Paragraph III, which embodies, not what was to be done by the Moore-Mansfield Construction Company, but what is to be done by the Traction Company. The language is clear and plain, it is:

“The Railway Company agrees * * * that portion of the work to be done by the Moore-Mansfield Construction Company shall be completed free from any claim of indebtedness, the holders of which may * * * be entitled to a lien of any kind against any of the property of the Railway Company so that the railway company’s issue of first mortgage bonds herein mentioned”—already issued and certified but which under the Farmer’s Trust Company case (App. original brief, p. 16; pp. 55-56, 62)

was subordinate to the liens for building the road—"shall be the only *indebtedness* against said Railway Company."

That is, the Railway Company agrees 1. (a) that the construction work to be done by Moore-Mansfield shall be completed free of liens, an easy thing to do so far as M. M. was concerned by paying them, (b) that the parties to whom M. M. had become indebted so as to entitle them to take liens, should be got out of the way—and this was what M. M. under Paragraph XIII was to do. 2. That there should be no outstanding indebtedness of any kind against the road except the mortgage bonds.

How did that concern M. M.? Was it (a) to pay its subcontractors, laborers and material men so that they might not take a lien; (b) to release its own lien without first being paid; (c) to pay all outstanding indebtedness of the company so that it should start the Traction Company in life free from the burden of debt?

Yes, to (a); No, to (b) and (c), and yet appellee's contention means precisely that appellant assumed each of the three.

To put it concretely in its simplest form appellees insistence is:

That appellant

a. Agreed in the first instance to do work exceeding a million dollars.

b. And in the second instance to do work amounting to over a half million dollars.

c. That having a full and complete security for whatever it might invest in this unbuilt road senior and paramount to everything including any mortgage that might be placed on the road by the Traction Company, voluntarily released its right to its lien receiving absolutely no security in its place.

d. And even went so far as to agree that if the Railway Company did not see fit to pay it, it would not even retain or hold an unsecured claim against the company for the unpaid balance, in the hope that the future might make its unsecured claim of some value; and this notwithstanding it well knew that it had a perfect right to a first lien of which it could not be deprived involuntarily and made its contracts with reference to and in reliance on that security and put into the road all the money that it did and but for that security would not have entered into the contracts or built the road which gave to the bonds whatever value they might have.

If it did this intentionally, and the intention to waive as we have seen *supra* is an essential element of waiver, we feel with Mr. Justice Grier in the Gaines Will case "*Haud equidem invideo miror magis*," 24 How. 631.

As to this intention we shall submit our views, more at length under the next proposition to be discussed.

IV.

THE REPORT OF THE MASTER ON THE SUBJECT OF WAIVER.

Appellant on the 25th of August, 1908, brought suit in the Superior Court of Marion County, Indiana, to enforce a mechanic's lien against the railway property of the Traction Company, claiming to hold the first and paramount lien by virtue of its mechanic's lien making among others the Trustee a party defendant. (Paragraph XI Masters Report P. R. 135.)

In June, 1909, the Installation Company filed its creditors bill against the Traction Company in the United States Circuit Court and such proceedings were had in that cause that the court below by its receiver took possession of its railway property, the appellant asked and

obtained leave to file and filed its cross-bill to enforce its mechanic's lien, as prior to the Circuit Courts assuming jurisdiction it had sought to do in the Superior Court. To this cross-bill the contracts of February 21st and June 6th, 1906, were made Exhibits "A" P. R. 36 and "AA" P. R. 39 and the Trustee was a defendant and filed its answer denying all knowledge of these contracts (Paragraphs II and III P. R. 87), but subsequently filed an amendment to Par. VI of its answer averring that the contract of June 6, 1906, (Ex. A. A.) contained certain agreements setting out in *extenso* Paragraphs III and XIII of the contract of June 6th and alleged "that by reason of said provisions in said alleged contract * * * said Moore-Mansfield, etc., has waived and foregone whatever right or rights it may have had at the time of the execution of said contract or which it may have thereafter acquired to claim a lien, etc., * * * and that under and by the terms of said agreement the said Moore-Mansfield, etc., admitted and agreed that the only indebtedness of said "Railway Company should be the mortgage bonds * * * and that by the agreements and conditions in said contract set forth and contained the said Moore-Mansfield, etc., has estopped and forever foreclosed itself from claiming any rights whatsoever which might be or become in said property prior to the lien of said mortgage."

There was no amendment of Paragraphs II and III of its answer in which it denied all knowledge of the terms and conditions of said contracts whether of February 21 or of June 6th up to the time of filing the answer January 29, so that there is in the pleadings no question of the Trust Company having accepted the mortgage with knowledge or in reliance upon said supposed waiver and it stands upon the record that it only acquired this knowl-

edge somewhere between January 29 and February 2nd, 1910, nearly four years after the execution of the contracts.

At the time of the reference the Master In Chancery to whom the case was referred was actively resisting the claim of the appellant to a mechanic's lien in the New-castle case, 179 Ind. 356, 101 N. E. 296.

There was no reason why this case should not be referred to him to report on the facts; there was no reason why it should—and every reason why it should not—be referred to him to report any legal conclusions and so the reference was made October 24, 1910:

“It is ordered by the court that the above entitled cause be and the same is hereby referred to Edward Daniels esq. Master In Chancery, who is directed to take such testimony herein as may be necessary and to report the same together with his finding of facts to this court with all convenient speed.” (P. R. p. 119.) And his report on the facts was filed April 12th, 1911. (P. R. 119 to 150.)

In this report he reports in *hæc verba* the contracts of February 21 and June 6, 1906, (Paragraphs VII and VIII P. R. 124-5), but did not report as a matter of fact that there had been any waiver of its lien by the appellant nor that the Trustee had any knowledge of any pretended waiver at the time of accepting the trust deed or that it had knowledge of or relied upon any supposed waiver of its lien by appellant, through such contracts or otherwise but did in specific language report:

“At the time the cross-complainant, The Moore-Mansfield Construction Company made the contracts hereinbefore mentioned and afterwards performed such contracts and under the same furnished material and performed work and labor, as it did do, in the construction of said Traction road, it was its information and belief that contractors and subcontractors under the laws of

Indiana were entitled to take, hold and enforce mechanic's liens for the value of such work, labor and materials furnished and used in the erection and construction of railroads in the State of Indiana, and that it contracted to furnish the materials and perform the labor, and it did furnish the materials and perform the labor required on said Traction road, and did permit the said Traction Company to become indebted to it for the value of the materials furnished and work and labor done and performed with the belief based upon the information which it had had for years that as such contractor it was accorded the right to hold and enforce a mechanic's lien therefor, and that but for that knowledge and information it would not have so contracted or furnished the materials or performed the labor which it agreed to do."

No exception was filed by the Trust Company.

a. To the failure of the Master to find that the appellant had waived its right to retain a mechanic's lien.

b. Or that there was any element of estoppel against appellant or in favor of the Trust Company.

c. To Paragraph XIII of his report or

d. To the evidence admitted to sustain the same but appellant and the appellees including the Trust Company were content to stand on the report as made and filed. Appellee insists that this court shall accept so much of the Master's Report as tends to support its contention but must discard everything that tends in the other direction and in support refers to a list of cases in which the holding was as follows:

In *Prescott v. Cooper et al.*, 37 La. Ann. 553 it was held:

"A party who seeks the annulment of his contract on the ground of error must establish error so alleged.
2. Where a party unconditionally assumes a liability he is bound thereby, although erroneously believed that such liability would be nothing or less than it proves to be. Such error effects the accidental and not the substantial quality of the object and cannot affect the contract unless induced by the fraud or false representations of the

other party. 3. Whoever alleges fraud must prove it. If false representations were made by a third party without the knowledge or procurement of the other party to the contract the validity of the contract is not affected thereby."

In *Thompson v. Ray*, 46 Ala. at 226, it is said:

"It is true that there is no contract unless the parties assent to the same thing and in the same sense. But if one seeks to convey his meaning by expressions importing something different, or attaches to the proposition of the other a significance not authorized whatever injury may result from the misunderstanding must be visited upon him."

In *Hyman, etc. Co. v. Smith et al.*, 10 West Vir. 298, it was held:

4. A commissioner's report if erroneous upon its face may be objected to at the hearing of the cause though no exception be previously filed; and also in the appellate court, although no exception appears to have been taken in the court below. The court saying at page 318: "While there may be injustice done to the appellants by the report of the commissioner as to some extent still as there were no exceptions filed to the report and the appellants were and are adults, I see no such error under the circumstances of the case upon the face of said report as to authorize this court to correct it in so far as it speaks of the appellants judgment liens, their priorities or the amount due thereon."

In *French v. Townes et al.*, 10 Grattan 513, it was said at page 526:

"The questions as to the construction of the instruments and the liability of the appellant for the price of Wellington, and the obligation of the said appellees to refund, are presented by the pleadings and proofs and no exception to the Master Commissioner's report was necessary to raise them for adjudication."

In *Lever v. Redwood*, 9th Porter (Ala.) 79, the court

after using the language quoted at page 22 of the brief of appellee adds at page 94:

"Here the defendants could not have been permitted to go before the Master or even be heard before him to make an exception according to the rule as laid down in *Mussina v. Bartlett and Waring*, and would be entirely without relief if they are not permitted to allege error on the face of this report * * * a reference to the Master could only have been for the purpose of ascertaining the interest accrued on the notes due. If any special circumstance had been suggested by the complainant as requiring modification of the usual decree, it would then have been proper to have directed a reference in order to ascertain and state those circumstances; or the order of reference might have directed the Master to state the results of his examination preparatory to a final decree."

In *Hurd v. Goodrich*, 59 Ill., the court said at pages 455-6:

"Consistently with the convenience of courts of equity in this respect their modes of procedure require the person who may desire to have the court revise the rulings of the Master as to the admission or rejection of evidence or the principle upon which an account is stated to file objections to the Master's report before it is returned into court pointing out the grounds with reasonable certainty; then if the Master still adheres to his rulings and report and returns it into court, the party objecting may then file his exceptions to the report corresponding with the objections made before the Master upon the hearing of which the whole, or such part of the evidence as may be material will be brought forward and be subject to review by the court (authorities). The exceptions are always to be confined to such objections as were allowed or overruled by the Master. * * * As a general rule this court will not consider any objections to a Master's report unless exceptions were taken in the court below (authorities). Where the Master by his report states all the facts correctly but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the Master's finding to except

to the report as the question decided by the Master may be opened upon further directions without exceptions. (2 Daniel, 1492.) This is an exception to the general rule but this case does not fall within it for it is not a case where the Master states the facts. The objections to the Master's report are made for the first time in this court."

In *Monehan v. Fitzgerald*, 62 Ill. App. 192, it was said by the court at 193, citing 2 Daniels Chancery, 1310:

"Where the party against whom the master reports questions conclusions which the master has drawn from the facts no exception need be taken. The objection that the appellants were not, upon the facts reported, entitled to a decree may be made by the appellee when a decree was applied for."

In *McMannomy v. Walker*, 63 Ill. App., it was said at page 277:

"If the master has not followed the terms of the reference to him the remedy is not by excepting to his report, but a special application should be made to have the irregularity corrected (authorities). If he has reported the facts correctly with a wrong legal consequence no exception is necessary; the question may be opened without (authorities). But if his conclusions of facts are questioned, then, to review them, exceptions must be taken."

Quoting at page 279 from Marshall C. J.

"The report of the master is to be received as true when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master or by evidence which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies."

In *Trigg v. Read*, 24 Tenn., at page 532, it is said:

"As a general principle, agreements entered into in good faith under ignorance and mistake of law are held valid and obligating on the parties. *Ignorantia legis neminem excusat*. If this were not so there would be no saying to what extent the excuse of ignorance might not be carried,

and if upon the mere ground of ignorance men were permitted to overhaul or extinguish their most solemn contracts there would be much embarrassing litigation in all judicial tribunals and no small danger of injustice from the nature and difficulty of the proof."

But this language is immediately followed by the language: "But the general principle that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity is well settled." And at page 534: "On the contrary, it has been held in England as unquestionable doctrine 'that if a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from an effect of his mistake.'" And at pages 535-6: "We, therefore, think the principle as settled in the United States to be that an ignorance of the law, however plain and settled the principles may be, and a consequent mistake as to title founded upon such ignorance, furnishes no ground to rescind agreements or to set aside solemn acts of the parties when they have been made with a full knowledge of the facts, unless they be tainted by imposition, misrepresentation, undue influence, misplaced confidence or suspicion. Such is the law when the party acts with a knowledge of the facts constituting his right of title." And at pages 542-3: "If the contract be made in ignorance of the fact of a right or title in vendor, the legal construction of which divests him of that right or title, it will be declared void and rescinded."

In *Holmes v. Hall et al.*, 8 Mich. 65, it was held that an instrument in writing deliberately adopted by the parties must stand as written, although the parties may have mistaken its legal intent, the court saying at page 69:

"It was decided in the latter (Rousmanier) case (1st

Peters 1) that even in equity an instrument must stand as written if deliberately adopted by the parties, although they mistook its legal intent, the mistake being one of law merely, and especially so when the rights of creditors intervene. We are bound, therefore, to look for the intent of this agreement to the paper itself and not beyond it."

In *Ridlen, Administrator, v. David*, 51 Vermont 457, it was said at page 461:

"So if the intestate supposed he could and in that view made to him the proposal in full as found by the court, so far as that part of the consideration for defendant's promise and performance are concerned, it was at most a mistake of law on her part and so could not be available as a ground for invalidating her promise that defendant should have the note. We do not, therefore, find it needful to determine whether, for what defendant had done, he could have enforced compensation against the intestate. It comes, then, to this: Did the performance by the defendant of what he undertook to do, render effectual in his favor the promise of the intestate that he should have the note?"

In *Branger et al. v. Chevalier*, 9 Cal. 353, it was held:

1. An order of reference cannot go beyond the pleadings.
2. When the referee excludes proper or includes improper evidence or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except and see that the exception is truly stated in the report.
3. But when the alleged error consists in the final conclusion of law or fact drawn from the testimony and the evidence is certified to the court, the proper course is to move to set aside the report and for a new trial. (Field, J., concurring.)

In *Northern Assurance Co. v. Building Association*, 183 U. S. 308, the rule governing the construction of written

instruments is stated by Mr. Justice Shiras, at p. 361, the chief justice, Justices Harlan and Peckham dissenting:

"Contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot, by the courts at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts."

In *A. & E. E. L.*, Vol. 7, page 113, note, it is said that "where two parties enter into a writing specifying the terms of their contract, they are mutually bound by these terms as expressed in the writing and as construed by the court, although the understanding of one as to the effect of these terms may differ from the understanding of the other." Note. There is no suggestion in the master's report or the evidence that the Trustee understood the contract between the appellant and either the Traction or the Installation Company in any manner different from that by the appellant.

In *American, etc., Co. v. McWhorter*, 78 Ind. 136, it was held that the law affords no relief to him who is able to read who signs a contract without reading it, imposing a blind confidence in the representation of another whose interest is adverse as to the contents of the instrument.

In *Payne et al. v. Smith et al.*, 24 Northwestern (Minn.) 305, it was held if the minds of the parties meet upon the terms of their agreement there is a binding contract, although one of them may have been mistaken as to their legal effect.

In *Allen et al. v. Galloway et al.*, 30 Fed. 466, it was said by Hammond, judge, at page 467: "Whatever rule may prevail elsewhere there can be in the equity courts no relief from a mistake of law."

In *Citizens, etc., R. R. v. Judy et al.*, 146 Ind. 322, it is held: 1. While equity will reform a contract where there

is a mutual mistake, it will not where the mistake was only on the part of one. 2. Where a special finding is outside the issues in a cause it is a nullity and can give no support to a conclusion of law thereon.

In *Egan v. Clasby*, 137 U. S. 655, the only error assigned was that the court erred in not giving judgment in favor of the plaintiff as a necessary legal conclusion from the findings of fact, the pleadings and the proper interpretation of the contract sued on, on which the court says at page 660: "We think the finding of fact conclusively negatives this contention."

In *Adams v. Claxton*, 6 Vezey, Jr., 226, one Wood had been executor of the will of one Boyfield and had embezzled the funds of the estate. He held a life insurance policy in his favor, to which he had attached a memorandum purporting to assign the interest in the policy with other moneys for the benefit of the heirs of Boyfield, but retained the policy in his possession. He made a trust deed for the benefit of his creditors and this policy with the memorandum attached came to the possession of the trustee.

The master, upon a reference, reported that by the attached paper Wood had so appropriated the benefit of the policy that the persons interested under the will of Boyfield had the benefit of the money, Wood in the meantime having died.

On this question it is said at page 230:

"The other question arises in consequence of a reference to the master to inquire to whom the policy of insurance upon Wood's life, or the money that may be received thereon, belongs. The report states all the circumstances and concludes that the master conceives the testator Wood did by that paper writing so appropriate the benefit of the policy that the persons interested under the will of Boyfield have a right to the benefit of the money. No exception is taken to the report, but the whole matter appears upon

the face of it, and therefore it is contended that it is open to inquire whether the master's conclusion is right, and I apprehend it is so open."

Upon consideration of the policy the paper attached to it, in the absence of certain matters from the report, the chancellor concluded that this undelivered paper did not operate as a transfer and therefore concludes (p. 231): "Therefore, upon this question the master has drawn a wrong conclusion and this policy must be considered as constituting part of the general effects for the benefit of creditors."

In *Waterman v. Banks*, 144 U. S. 394, a certain contract had been entered into between the parties under which it was held: 1. That taken in connection with the evidence, this conveyed to J. S. W. no present interest in the property, but only the right to acquire such an interest within a period of twelve months from this date. 2. That time was of the essence in such a contract for acquisition.

It was said by Mr. Justice Harlan at page 400:

"We cannot assent to the view taken by the court below; the bill alleges—and the evidence fully sustains the allegation—that when the writing in question was given the title to this property was in dispute, etc."

And at page 407:

"An interlocutory decree was rendered declaring the plaintiff to be entitled to the relief asked, and the cause was referred to the master to state the accounts between the parties in respect to the use of the property and the profits derived from it. The master made his report, and the final decree recites that each party waived the right to except to it. This waiver is relied upon as showing that the final decree was by consent, and, therefore, not to be questioned in this court. This contention is overruled. The waiving of exceptions to the master's report meant nothing more than that the appellant did not dispute its correctness in respect to the amount of the profits realized from the property."

This was all that was referred to the master.

In *Von Platen et al. v. Winterbottom et al.*, 67 Northeastern 843 (Ills.), it was held that a master's conclusions of law are reviewable without exceptions. It is not suggested that his finding of facts can be questioned otherwise than by exceptions. To the same effect are *Williams et al. v. Spitzer*, 68 Northeastern 49; *Von Tobel v. Ostrander*, 42 Northeastern 152; *Kester v. Lyon*, 20 Southeastern 933.

In *Smith, Trustee, v. Wells, etc., Co. et al.*, 148 Ind. 333, it was held that in construing a special finding the court would construe the whole of it, and upon such construction if a portion should fall they would disregard it.

In *The Richmond, etc., Co. v. Enterprise, etc., Co.*, 31 Ind. App. 222, the question decided arose upon a special finding, in one part of which there was a finding of the ultimate fact in one way and in another there was a finding of the primary fact in the other way. The appeal necessarily presented the correctness of the conclusion of law upon the whole special finding, and the Appellate Court held that where there was a controversy in the special finding taken as a whole between the primary and the ultimate fact, each of which was found, the primary should control.

In the quotation from Daniels it is said: "Where the master * * * states all the facts correctly, but is mistaken as to legal consequences, * * * it is not necessary for the party dissatisfied with the master's findings to except to the report, etc."

With reference to these several cases and especially the language of Mr. Daniel it is to be observed:

1. (a) That the reference called for a report only on the facts.

(b) That legal conclusions were sedulously omitted from the order of reference.

(c) That the answer did not tender merely the issue of the execution of the contract of June 6, 1906, that being averred as a part of appellant's cross-bill stood alleged and admitted without any reference to a master whatever.

(d) The issue of fact referred to the master for finding and report was, had the appellant waived its right to a lien.

(e) If the appellees, or either of them, had conceived that the master should have found that as a matter of fact appellant had waived its right to a lien, they should have filed exceptions based upon this failure.

(f) The burden of alleging and showing a waiver was assumed by the appellees respectively, and if the master failed to find in their favor on this issue and they failed to except, they have accepted such failure and cannot now be heard to complain.

2. It should also be remembered that neither in pleading nor argument has the appellee made any question whatever growing out of the execution of the contract of February 21 which was the only contract that was in force or had been executed prior to the execution of the trust deed and the bonds secured by it.

3. In whatever was done after the trust deed was made neither the trustee nor the bondholders were parties and, as the record discloses, had no knowledge of its terms until years later and accepted their security with full knowledge of the principle that had been in force in Indiana for more than fifteen years, in *Farmers, etc., Co. v. Canada, etc., Co., supra*, that if they desired to have the first lien upon the mortgaged property they must at their peril see to it that those who built the road on which they were claiming a lien had been fully compensated, as suggested, *supra*.

4. The court did not sustain in its decree the claim of

waiver, but as it is in the record we have devoted so much time to its consideration here.

V.

THE BRENNAN CASE AND CASES FOLLOWING IT
—NO MECHANIC'S LIEN IN FAVOR OF
CONTRACTORS OR CORPORATIONS.

(Appellees' Points 3 and 4; its brief pp. 4 and 5 and 28 to 32.)

Appellees' Points 3 and 4 can to advantage be discussed together, inasmuch as it is absolutely certain that *Ward v. Yarnelle*, 173 Ind. 535, is based wholly upon the principle announced in the Brennan case, that a contractor, who does not work with his own hands, but only with the hands he employs, and as a corporation cannot work with its hands—except as it employs them—it is as a contractor, not as a corporation, denied the right to a lien.

The learned counsel for appellee, the Trust Company, having succeeded in *Indianapolis, etc., Co. et al. v. Brennan et al.*, 174 Ind. 1, followed in *Korbly, Rec. v. Loomis*, 172 Ind. 352; *Ward et al. v. Yarnelle et al.*, 173 Ind. 535; *Fleming v. Greener*, 173 Ind. 260, and *Cleveland, etc., Co. v. De Fries*, 173 Ind. 717, in perverting the law of the state and inducing its Supreme Court to overturn the settled policy of the state and overrule all its previous decisions on that subject, now seeks to obtain the full benefit of his labors in the courts of the United States, and more especially in this court. The first of the above-named cases was decided February 18, 1909; the second June 2, 1909; the third February 25, 1910, the fourth March 9, 1909, and the last March 10, 1909.

The learned counsel for the Trust Company does not appear to have participated as counsel for the appellants in any of the cases except the Brennan case, but as all the

others simply followed that decision, whatever of credit there is in any of them he is justly entitled to.

Under the law in Indiana the losing party in a case in the Supreme Court has the right to present his petition for a rehearing, but this he must do within sixty days from the decision of the case. That this was done in the Brennan case appears from the opinion at p 41 of 174 Ind., but the record does not disclose the date of its filing, but it could not have been filed later than April 19th. This petition for a rehearing remained pending and undisposed of until December 7, 1909—174 Ind. 1—when it was overruled; meanwhile, however, *Korbly v. Loomis*, while the petition for rehearing was pending, was decided, still further committing the Supreme Court to the doctrine of the Brennan case.

We have presented the objections to this line of decisions in our original brief to scant purpose if we have not convinced this court that they are radically wrong for reasons therein stated, and that the decision in *Moore-Mansfield, etc., Co. v. Indianapolis, etc., Co.*, 179 Ind. 356, 101 N. E. 296, overruling them and each of them is right.

The whole theory of the ruling in the cases attacked on this appeal is that the language of Sec. 12 of the Act of 1883 touching contractors is inoperative because not within the title of the act and therefore forbidden by Sec. 19 of Art. IV of the State Constitution.

The act in question by its title was with respect to mechanic's liens, "An act concerning liens of mechanics, laborers and material men," our original brief, p. 70. The constitutional provision in question required, not that the provisions of the body of the act should be embraced in the title, but that acts should "embrace but one subject and matters properly connected therewith, which *subject* shall

be expressed in the title," our original brief p. 77. The opinion in 179 Ind. 356, fully disposes of the objection, which at best is but fanciful and fantastic, with no real substance or foundation to it. An instructive commentary on the uses of just such a constitutional provision is afforded in the language of this court in *Boyd v. Alabama*, 94 U. S. at 646, where it is pointed out that under such a harmless and innocent title as "An act to establish a mutual aid association and to raise funds for the common school system of Alabama," of which this court said immediately following: "The act had a very fair and promising appearance and to the casual reader would seem designed to promote the cause of science and art, advance education and diffuse knowledge." And yet under this title there had been established a scheme of lottery, than which there is nothing more debauching to the morals of the individual or the community.

It is not entirely accurate to say that the Supreme Court of Indiana in *Hall v. Bunte*, 20 Ind. 304, had only passed on the question that the act of 1852 simply gave a remedy and did not consider the constitutional question. Upon that point the court says at page 304:

"This statute, it is insisted, so far as it undertakes to give a mechanic's lien on buildings, etc., is void, because the title of the act is not sufficient for that purpose. The title is as follows:

" 'An act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the courts of this state; to abolish distinct forms of action at law, and to provide for the administration of justice, in a uniform mode of pleading and practice, without distinction between law and equity.' 2 R. S. 1852, p. 27.

"The substance of the appellant's argument is, that there is a marked and clearly defined distinction between

RIGHTS and REMEDIES; that the title above set out purports to deal alone with remedies, and that as the Legislature, under that title, have undertaken to confer rights, viz.: to acquire and hold a lien on buildings, etc., they have violated the constitutional requirement that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." Hence it is claimed that that part of the law giving the lien is void.

"During the decade of years that has passed since this statute was enacted it has always been regarded, in practice, as valid, its validity having been repeatedly recognized by this court. *Deming v. Patterson*, 10 Ind. 251; *Wasson v. Beauchamp*, 11 Ind. 18; *Ainsworth v. Atkinson*, 14 Ind. 538; *Green v. Green*, 16 Ind. 253. There are undoubtedly, other like cases in the forthcoming three volumes of reports, not published at the time of the preparation of this opinion."

It is fair to say that in the general title of the practice act there was no suggestion on the subject of mechanic's liens further than the subhead to Art. 36, but inasmuch as the act had been in force when it was questioned in *Hall v. Bunte* for substantially ten years and there had arisen under it ten cases where the mechanic's lien had been upheld, the court yielding to the doctrine of practical construction refused to hold the act unconstitutional and adhered to that ruling in *Colter v. Freese et al.*, in 45 Ind., where it is said at page 112: "It has been suggested that the statute with the construction placed upon it is unconstitutional for the reason that the subject-matter is not expressed in the title. This, we think, was settled by the case of *Hall v. Bunte*, 20 Ind. 304."

On the question of practical construction it was said by the Supreme Court of Indiana in *Hovey, Governor, v. The State ex rel., etc.*, 119 Ind. at p. 388:

"As there is some warrant in the Constitution for the claim of the legislative right to appoint the governing officers of the benevolent institutions, it is our duty to ascertain what practical exposition has been given to the Constitution, and if we find a principle established by long continued practice we must yield to it, unless we are satisfied that it is repugnant to the plain words of the Constitution. We are far from asserting that the plain provisions of the Constitution may be broken down or overleaped by practical exposition, but what we do assert is, that where, as here, there are provisions not entirely clear and free from doubt, practical exposition is of controlling force.

"Our own and other courts have time and time again adjudged that practical exposition is of controlling influence wherever there is need of interpretation. The language employed by the courts is strong and the current of opinion is unbroken. In speaking of the effect of a practical exposition it was said by an able court that 'it has always been regarded by the courts as equivalent to a positive law.' *Bruce v. Schuyler*, 4 Gilm. 221. In adhering to long continued exposition another court said. 'We cannot shake a principle which in practice has so long and so extensively prevailed.' *Rogers v. Gooden*, 2 Mass. 478. But it is unnecessary to quote the expressions of the courts, for harmony reigns throughout the whole scope of judicial opinion upon this subject. *Board, etc. v. Bunting*, 111 Ind. 143; *Weaver v. Templin*, 113 Ind. 298, 301; *Stuart v. Laird* 1 Cranch 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Ogden v. Saunders*, 12 Wheat. 213, 290; *Minor v. Happersett*; 21 Wall. 491; *State v. Parkinson*, 5 Nev. 15; *Fike v. Megoun*, 44 Mo. 491; *People v. Board, etc.*, 100 Ill. 495; *State v. French*, 2 Pinney (Wis.) 181.

"Practical exposition establishes a principle. Particular instances fall within general rules, and practical exposition establishes general rules for the government of particular instances. Practical exposition does not give rights

in particular cases, since to give it that effect would create an evil as great as that of class legislation, and against that evil is directed some of the strongest provisions of our Constitution. Courts must search for the general principle which practical exposition establishes, and, when that principle is discovered, apply it to all cases within its legitimate sweep."

In *French v. State ex rel. Harley*, 141 Ind., on the subject of practical exposition as affecting constitutional questions, it was said by the Supreme Court of Indiana, at page 628:

"We do not sympathize with the eloquent and able appeal of the appellant's counsel against the doctrine of practical construction as the resort of cowards and a makeshift for avoiding the intention of the framers of the Constitution.

Upon the doctrine of practical construction and its legitimate scope we will quote the following from the opinion in *Hovey, Governor, v. State ex rel.*, 119 Ind. 386, in which a majority of the court then sitting concurred:

"Our own and other courts have, time and time again, adjudged that practical exposition is of controlling influence wherever there is need of interpretation. The language employed by the courts is strong and the current of opinion is unbroken. In speaking of the effect of a practical exposition it was said by an able court that "it has always been regarded by the courts as equivalent to positive law." *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221. In adhering to long continued exposition another court said: "We cannot shake a principle which in practice has so long and so extensively prevailed." *Rogers v. Gooden*, 2 Mass. 478. But it is unnecessary to quote the expressions of the courts, for harmony reigns throughout the whole scope of judicial opinion upon the subject."

The present case presents, as strongly as any in the state's history, a practical construction of our present Constitution upon the question in review. Beginning with the session of 1855, when the board of prison directors was created, and at the first session of the General Assembly after the adoption of the Constitution, when existing

prison leases were permitted, we find the General Assembly assuming the appointing power as to the officers of state's prison control.

We find that in 1859, the Constitution not yet ten years in force, the General Assembly assumes and exercises the power of appointment of the state's prison directors for the northern prison. We find that from session to session from those periods to the session of 1893 this power was assumed and exercised by the General Assembly without exception, doubt or question of authority. The exercise by the General Assembly, for nearly forty years of this power, without question from the people and covering periods of the bitterest political history in the annals of our state and nation, is not the only fact giving strength to the construction favoring the existence of that power. In the early periods of that assumed authority there were in the General Assembly, as members thereof, David Kilgore, Walter March, Walter E. Beach, Thomas D. Walpole, Henry G. Todd, Amzi L. Wheeler, Ezekiel D. Logan, Rodolphus Schoonover, John L. Spann, Samuel J. Anthony, Jefferson Helm, John Mathes, Spencer Wiley, William F. Sherrod, George W. Moore, Hugh Miller, Isaac Kinley, Allen Hamilton and possibly others who had also been members of the constitutional convention."

The same members of the constitutional convention that are named above sat in the Legislature which passed the practice act of 1852.

In *Smith et al. v. Newbaur*, 144 Ind. 95, it was held that the mechanic's lien law of Indiana was constitutional. The court, Howard Chief Justice, saying at pages 97-9:

"It has often been held that every statute under which a contract is made enters into and forms a part of such contract. The appellants in the contract for the erection of the dwelling house upon their property are therefore chargeable with knowledge of and are bound by all of the provisions of our mechanic's lien law then in force. By the terms of the agreement entered into the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished and the law under which the con-

tract was made was further notice that the building and ground upon which it was to be erected would be liable to a lien for the value of the materials so furnished * * * besides it is to be remembered that without the right to a lien on the property, laborers and material men would in many cases have no security for their toil or the materials furnished by them. The laborer is worthy of his hire and the seller of goods ought to be paid for them. As the law stands, all parties are secured in their rights, the owner by seeing that laborers and material men are paid or by keeping back for sixty days, from a contractor, sufficient to make such payment is in no danger of having to pay twice for his building while at the same time the man whose labor or material has gone into the building can look to the building itself and to the ground upon which it stands for his security. The property owner enjoys the benefit of this work and of this material and it is but just that he should be charged for at least sixty days with the responsibility of seeing that they are paid for."

In *St. Bd. of Assessors v. Cen. R. R. Co.*, 48 N. J. L. 146, it is said by Chancellor Runyon our *certiorari* to the Supreme court at page 276:

"The fact that railroad property when the Act of 1884 was passed, had been separately taxed under similar legislation both for state and local purposes for so many years and that the validity of such legislation on the ground of unconstitutionality had not been brought to any judicial test, although immense interests in the hands of vigilant guardians, had been annually affected by it, is an important circumstance in the consideration of the question now before the court because so practical and contemporaneous a construction of the constitutional provision acquiesced in for so long a time under such circumstances and one so clear and uniform must have weight with the court in settling judicially the construction of the provision if the construction were otherwise doubtful."

On the other hand in *Knight v. Shelton et al.*, 134 Fed. 423, it was held; 3. In order to entitle a contemporaneous

construction of a consittutional or statutory provision * * to controlling force such provisions must not only be ambiguous and thus a proper subject for construction but such construction must have been uniform and within a reasonable time of the enactment of the provision. (Note. A construction covering twenty-six years and thirty-two cases might well be said to meet this rule.) 4. Decisions of the Supreme Court of a state construing and applying an amendment to the state constitution are not to be construed as determining its validity or that it was legally adopted where such question was not raised nor considered; and such decisions do not therefore affect the right and duty of a Federal Court to consider and determine such a question in an act in which it is directly presented. The court, Judge Trieber, saying at pages 436-7: "But neither the reports of these cases nor the original records thereof including the briefs of counsel, which the court has carefully examined, show that these questions were either raised, argued by counsel or in any manner directly or indirectly brought to the attention of the court in either of the cases. Under such circumstances to contend that these cases are decisions of the court on that subject is against all reason and without any authority," and then quotes from *Boyd v. Ala.* The learned judge does not appear to have had his attention called to the decision of this court in *Douglas v. County of Pike*, 101 U. S. 680. It would seem that before a district judge in Arkansas would feel at liberty to overrule this court and disregard the precise and accurate language of one of its learned Chief Justices, at least his attention ought to appear to have been called to the decision that he was discrediting and while it might be said that it was a proper practice in Arkansas where the case arose, it ought not to have sufficient vitality to be instrumental in overrul-

ing the decision of *Byram v. The Board*, 145 Ind. 242-5, where the case under consideration arose in Indiana.

In the case at bar twenty-six years had passed over the head of the Act of 1883 and thirty-two opinions with respect to the rights of contractors and subcontractors had been handed down by the Supreme Court as shown in App. "A" of our original brief without a suggestion against its unconstitutionality and in that time twelve legislatures had come and gone and the thirteenth was about over, six governors had succeeded one another and investments had been made on the faith of that act. "A decent respect to the opinion" of the forty-four judges who had enforced the act and the thousands of legislators, who ought to have known the act was unconstitutional, if it was, should have induced the Supreme Court of Indiana to refrain from overturning the settled law of the state and depriving parties of rights that had become vested under those decisions.

As to *Ward v. Yarnelle*, *supra*, which forbade the benefits of the lien law to corporations we think it entirely sufficient to say that it is simply a restating of the Brennan case.

In the Statute of Indiana, giving definitions it is provided: "The following rules shall be observed, when consistent with the context * * * the word 'person' extends to bodies politic and corporate." Sec. 1356, I R. S. 1908.

In the list of cases Appendix "A" our original brief, pp. 69-72, in which contractors have been accorded the right to take and enforce a mechanic's lien, there are three cases of corporations, viz: *Nordyke, etc., Co. v. Dickson*, 76 Ind. 188; *Totten, etc., Co. v. Muncie Nail Co.*, 148 Ind. 372; *Sulser Machine Co. v. Rushville Water Co.*, 160 Ind.

202 and one additional however, not named in appendix "A"; *Potter Mfg. Co. v. A. B. Meyer, etc., Co.*, 171 Ind 513, Sec. 2716 Thompson on Corporations, can be cited to sustain either side of the question so that on the doctrine of equitable set-off it would not seem to be entitled to any weight.

So that every objection made to the deprivation of the right to take a lien by a contractor or subcontractor by a change in judicial construction applies equally and alike to deprivation as to a corporation.

We shall later under VII *post*, submit some further observations on this question that are more particularly appropriate however under the latter heading.

VI.

REMEDY PROVIDED FOR THE ENFORCEMENT OF A CONTRACT IS PROTECTED BY THE CONSTITUTION.

Appellees' Point V: (Its brief, pp. 5 and 32-45.)

It would seem that after the full discussion in our original brief and the copious citation of authorities on the question of remedy there can not be much necessity for a reply to appellees' brief on that point. Nevertheless the point is made and insisted upon and cases are cited in support of it, so that it seems proper at any rate to discuss it and the authorities cited to support it.

(a) Mechanic's liens.

Five cases are cited to the effect that a mechanic's lien being a mere remedy is not protected by the constitution, viz:

Woodbury et al. v. Grimes, 1 Colo. 100.

In *Woodbury et al. v. Grimes et al.*, 1st Colorado 100,

it was held that the Act of 1867 repealed the Act of 1864, with reference to mechanic's liens and that the liens established by the Act of 1864 were not protected from legislative interference by the clause of the constitution which relates to the obligation of contracts.

Bailey et al. v. Mason, 4 Minn. 430.

In *Bailey et al. v. Mason*, 4 Minn. (546), 430, it was held:

1. The lien of the mechanic does not arise out of a contract, but depends alone on the statute and the lien falls with the repeal of the law before it is perfected by judgment and where the builder had proceeded no further than to file his notice or petition for a lien, it was not protected so as to save it from the effect of the repeal of the law. The court saying: "The lien of the mechanic * * * upon the building and real estate does not arise out of his contract but depends on the statute alone for existence. It is a preference which he may secure if he proceed in a particular way; but if before he has fully perfected these proceedings the legislature sees proper to repeal the law he really loses nothing—he is merely unable to secure an advantage which without the statute he is in nowise entitled to."

Hanes, etc., v. Wadey (Mich.), 2 L. R. A. 498.

In *Hanes, etc. v. Wadey*, (Mich.), 2 L. R. A. 498, (January 1889). It was held:

1. A mechanic's lien, given by statute, is liable always to be modified, altered or repealed by the same power that created it. Being only a means for enforcing the payment of a debt * * * it is not a vested right but may be taken away without impairing the obligation of the contract.

The court saying at page 500:

"The lien is bestowed, not to create a debt or charge, but to create a remedy. This remedy that the legislature has created in derogation of the common law it can take away and no one can have a vested right to *any particular remedy* * * ." (Our italics.)

It is true one may furnish the materials in view of the law as it exists at the time; but he furnishes the same with notice that the law is subject to the will and control of the legislature. The lien is but a means for enforcing the payment of the debt arising from the performance of the contract—a remedy given by law; which remedy not being of the essence of the contract is entirely within the control of the law making power by whose authority it was given life. The right to a *particular remedy* (our italics), is not a vested right.”

Reference is made to the notes in *Best v. Baumgardner*, *post*.

Frost et al. v. Ilsley, 54 Me. 345.

In *Frost et al. v. Ilsley*, 54 Maine 345, the work in question was done in 1855, and if plaintiff had proceeded timely he would have been entitled to his lien but the legislature in 1858 provided that the lien should not continue for more than ninety days after the performance of labor or furnishing the materials, unless the attachment was made or a memorandum of the contract recorded as mortgages are to be recorded. The court saying at page 351:

“The lien is but a means of enforcing a contract, a remedy given by law and like all matters pertaining to the remedy and not to the essence of the contract until perfected by proceedings whereby rights in the property over which the lien is claimed have become vested, it is entirely within the control of the law making power in whose edict it originated.”

Best v. Baumgardner (Pa.), I. L. R. A. 356.

In *Best v. Baumgardner*, I. L. R. A. 356, (1888), it was held:

1. The Act of 1887 extending the Act of 1861—which was local—to the whole state, and adding a new provision requiring claimant to give notice of his intention to entitle him to the benefit of the act is a substitute for the earlier acts.

2. The provision requiring notice where the delivery was completed and the lien filed after the passage of the act, although it was all contracted for and part delivered before, applies.

3. Such change is not unconstitutional in reference to a contract made prior to the passage as impairing the obligation of the contract since they affect only the remedy—not the contract.

The court saying at page 361:

"These—the remedies—may be greater or less more favorable in some cases than in others but they are remedies still. In an eminent decree is this true of a remedy by claim of lien. It is a pure creature of statute, favoring and intending to favor certain classes of persons and not all alike, formerly having no existence and latterly a somewhat wider scope. The power which gave it, may at any time take it away entirely and still not in any sense become answerable to the imputation of impairing the obligation of a contract. How much more may that same power modify or restrict the remedy or rearrange the terms upon which it may be invoked and exercised? In the present case the remedy may not be used unless a notice of intention to resort to it is previously given.

Surely this provision in no manner touches the obligation of a contract and hence the constitutional objection of the contract has no application."

The decision—that to avail himself of the amended law the lien claimant should give the required notice is probably correct. It leaves still the remedy of the old act unimpaired, provided the required notice is given.

The language of the judge especially in so far as it says that "it—the legislature—may at any time take it away entirely, etc.," was obviously wrong as abundantly shown by the copious notes attached to the report of the case.

The first two cases, *supra*, arose in territorial legisla-

tures. The constitutional prohibition against the impairment of the obligation of a contract is confined to an impairment by states and has no application to the United States.

Sinking Fund Cases, 99 U. S. 700 at 718;
Legal Tender Cases, 12 Wall. 457.

In the last two cases the remedy was not destroyed; it was only altered and while there is language tending to support the proposition that the legislature may by amendment or by repeal destroy entirely the remedy, when contrasted with the cases cited in our original brief we do not believe they require extended discussion.

(b) Judgments.

Louisiana, etc., v. New Orleans, etc., 109 U. S. 235.

In *Louisiana v. New Orleans, etc.*, 109 U. S. 235, it was held:

1. The right to demand reimbursement * * * for damages caused by a mob is not founded on contract.
2. That this right has been converted into a judgment does not make the obligation such a contract as is contemplated in Sec. 10 of Art. 1. 3. The contract protected by the constitution is the agreement of two or more minds to do or not to do certain acts. 4. To deny to a municipal corporation the right to impose taxes to pay a judgment recovered for injuries done by a mob is not protected by the 14th Amendment to the Constitution.

In *Garrison v. City of New York*, 21 Wallace, 196, it was held that proceedings to condemn for widening and straightening a street did not constitute a contract protected by the provision of the United States Constitution against impairing its obligation.

To the same effect is *Essex Public Road Board v. Skinkle*, 140 U. S. 334.

Blount v. Windley, 95 U. S. 173.

In *Blount v. Windley*, 95 U. S. 173, it was held:

1. When no rights of third parties interfere the extent to which mutual obligations may be set off against each other and the mode of doing it are wholly subject to legislative control. 2. A statute passed after the judgment had been obtained authorizing the judgment defendant to set-off against it the circulating notes of the bank * * * does not impair the obligation of the contract sued on or of the judgment. 3. But if the rights of either creditors of the bank or other parties interested in the payment were such that they could exact payment of the judgment in lawful money the case would be different.

The court, Mr. Justice Miller, saying at page 180:

"The act of the North Carolina Legislature is but an enlargement of the principle of set-off to meet this class of cases. Though the statute uses the word payment it is obvious that payment in the technical sense is not meant. The whole proceeding is one of set-off. The defendant is compelled to make his application to the court, produce his bank bills and deposit them there. The order or judgment of the court is that the obligation of the bills and the obligation of the judgment are set-off against each other and both are extinguished, they are both satisfied. It may be said that this legislation is retroactive and as applied to the case before us, it is so but there is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial and sometimes necessary. Where they violate no provision of the Constitution of the United States, there exists no power in this court to declare them void." The court disposes of the claim of violation of the obligation of a contract in an illuminating statement on pages 175-6, in which it reaches the conclusion that the set-off does not impair the obligation of a contract.

Freeland v. Williams, 131 U. S. 405.

In *Freeland v. Williams*, 131 U. S. 405, it was held that the provision in the Constitution of West Virginia, that the property of a citizen should not "be seized or sold under final process issued upon judgment or decrees heretofore rendered or otherwise because of any act done according to the usages of civilized warfare in the prosecution of 'the war of the rebellion' by either of the parties thereto," does not impair the obligation of a contract within the meaning of the Constitution of the United States when applied to a judgment previously obtained founded on a tort committed as an act of public war. Of this question it was said by Mr. Justice Miller, page 413:

"On this question the court has very little difficulty. The proposition that a judgment duly rendered in a court of law in an action of tort is protected by this provision of the Federal Constitution has been before us more than once in recent years and was before this court also many years ago."

And at page 416:

"We are of opinion that the Constitution of West Virginia of 1872, in its provision for this class of cases does not violate the obligation of a contract where the judgment was founded on a tort committed as an act of public war."

Moore v. Holland, 16 S. C. 15.

In *Moore v. Holland*, 16 South Carolina 15, in February 25, 1867, the note was executed for \$2,000, to bear interest at the rate of 16 per cent. per annum, payable one day from date. Suit was brought on the note on the 25th of February, and on the declaration was endorsed a confession of judgment \$2,000 with interest from February 25, 1867, at the rate of 16 per cent. Judgment was enrolled March 2, 1867, but with no provision in regard to interest that the judgment should bear. January 25, 1875 the maker

of the note made a mortgage to secure the payment of the money with 18 per cent. per annum. January 9, 1877, Dunovent's real estate was levied on under the execution. The Act of 1866, under which the first judgment was rendered provided that the legal interest should be 7 per cent. The Act of 1870 denying to final judgments thereafter rendered the incidents of a lien upon real property is not unconstitutional as regards contracts entered into prior to its passage. It was held that the Act of 1866, controlled the judgment and it did not matter that the defendant consented to a higher rate of interest, and that the lien on real estate, which the previous law allows to judgments and decrees was no part of the remedy of enforcement.

Boyd v. Ala., 94 U. S. 645.

In *Boyd v. Ala.* 94 U. S. 645, it seems that: 1. October 10, 1868, there was an act passed under a false and misleading title under which it was claimed that a license was granted to carry on lotteries and sell tickets. 2. Before this act was passed, there was a statute of the state prohibiting lotteries and imposing a fine and that statute remained unrepealed. 3. The Act of 1868 was repealed in March, 1871. Under the statute prohibiting lotteries, the defendant was indicted, convicted and sentenced to pay a fine of \$1,000. On the trial the defendant admitted that he had been engaged in setting up and carrying on a lottery, but justified under the Statute of 1868. The question therefore presented was as to the constitutionality of the Act of 1868, and the effect upon the right or privilege by the repealing Act of 1871. The plaintiff in error contends that his right to carry on a lottery rested on a contract. In a former case against the defendant it seems that the Supreme Court of the state held, that the statute constituted a contract and the repealing act was void,

but in that case the constitutionality of the act was not drawn in question but in the latter case it was and the court held that it was unconstitutional in not complying with the requirement of the Constitution as to the title upon which the court said at page 649:

"We cannot refuse to give effect to that decision. It is the province of the Supreme Court of the state to construe its own Constitution and laws; and, when it decides that one of its laws is not authorized by its Constitution, it is not for us to deny the correctness of the decision, when *there is no evasion in this way of Federal authority.*" (Our italics.)

And the court adds at pages 649-50:

"1. While the state has seen proper, through its prosecuting officer, to admit that if the statute of 1868 were constitutional, and had not been repealed, the acts charged against the defendant would be legal, we do not wish to be considered as adopting this conclusion * * *. 2. We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."

In *Louisville, etc., Co. v. Railroad Commission*, 157 Fed. 944: No principal that has the slightest bearing on this case is decided. The only tatter of a suggestion is contained in an isolated sentence at page 955. "For a noted case of great hardship see *Boyd v. Ala.*, 94 U. S. 648." A careful examination of citations would discover that *Boyd v. Ala.*, had been cited in this case which is the only excuse for citing the case here. The same may be said of *U. S. v. Powell*, 151 Fed. 648.

Watson v. New York Central, etc., Co., 47 N. Y. (2 Sickels) 157.

In *Watson v. New York Central, etc., Co.*, 47 N. Y. (2 Sickels) 157, it was held that the lien of a judgment on

real estate being purely statutory, it was within the power of the legislature to abolish the lien at any time before rights have become vested or estates acquired under it and to confine the remedies of the creditor to the property held by the judgment debtor at the time of the issuing of execution. The court saying at page 163: It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them and placing real estate on the same footing as personal property to confine the remedies of the creditor to the property held by the debtor at the time of issuing the execution." There was a dissent by Folger, J., but the grounds of the dissent are not stated. The question arose over condemnation proceedings under which owners of land were required to be parties to proceedings and compensation was to be made to them alone. The contention being that a judgment creditor was not an owner. There was no suggestion in the opinion that the judgment constituted a remedy for the enforcement of a contract indeed there is not a syllable in the decision on the subject of remedies and although the decision was rendered subsequent to the decisions in 1st, 2nd, 6th and 15th Howard and 4th Wallace, cited in our original brief at page 50, and quoted from pages 51 and 52 were either or any of them either quoted in the opinion or cited in the brief of counsel. The case was disposed of evidently on the theory that a judgment lien was not a remedy.

Morley v. Lake Shore, etc., Co., 146 U. S. 162.

In *Morley v. Lake Shore, etc., Co.*, 146 U. S. 162, in an opinion by Mr. Justice Shiras dissented from however, by Justices Harlan, Field and Brewer, it was held that where the Court of Appeals of the State of New York had held that a judgment obtained before the passage of the

act of the legislature of that state, reducing the rate of interest on judgments did not constitute a contract or obligation within the provision of Sec. 1 of the Constitution of the United States. This court accepted that construction, saying at page 168:

"After a cause of action * * * shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but a legislative discretion which is free so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment or not to do so. When such provision is made by statute, the owner of a judgment is of course entitled to the interest so prescribed until payment is received or until the state shall in the exercise of its discretion declare that such interest shall be changed or cease to accrue * * *. He has no contract whatever on the subject with the defendant in the judgment and his right is to receive and the defendant's obligation is to pay as damages, just what the state chooses to prescribe * * * the most important elements of a contract are wanting, there is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay."

There is no suggestion in the opinion that the judgment with its incidents of interest, etc., constituted part of the remedy that was or was not protected by the constitutional provision.

In Cyc. Vol. 8, p. 930, it is stated: "2. 'Contract' protected. A 'contract' within the Constitution of the United States is one relating to property or some object of value which imposed an obligation capable in legal contemplation of being impaired."

But in the paragraph immediately preceding (1) it is said: * * * "but a retroactive state law passed after that date (March 17, 1889) which impairs the obligation of a contract violates the Constitution. The prohibition

in question does not apply to acts of Congress, which may pass laws directly or indirectly impairing the obligation of contracts (Sinking Fund case, 99 U. S. 700), nor does it protect contracts made after the passage of the hostile law," and the section is immediately followed by Sec. 3 on p. 931: "3. What 'obligation' constitutes. The 'obligation' of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts and forming a part of them as the measure of the obligation to perform them by one party and the right acquired by the other, etc." And in Sec. 4, p. 932, it is said: "4. The law impairing the obligation—(a) In General. If any subsequent law affect to diminish the duty or to impair the right which the law defines upon the consummation of a contract, it necessarily bears on the obligation of a contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract, although professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

The first and third cases are cases of torts pure and simple and as such are held not to be under the *aegis* of the Constitution for the protection of contracts.

Under the second it is held that the right of equitable set-off that existed before the merger into a judgment was not taken away where there were no intervening rights.

Moore v. Holland was the case of an equitable petit larceny which was not protected by the constitutional provision.

Boyd v. Alabama refused the constitutional protection to a lottery agent under the guise of a charitable and educational institution.

Watson v. N. Y. Central, etc., was a case of condemnation proceedings and not of contract, and the New York court carried the doctrine of legislative control over judgments to the verge, if not beyond.

Morley v. Lake Shore held that the Legislature of New York held control over the question of interest as well after as before judgment had been taken.

MISCELLANEOUS.

Rockwell v. Hubbles, Admr., 2 Doug. (Mich.) 97.

In *Rockwell v. Hubbles, Administrator*, 2 Douglass (Mich.) 97, it was held that an exemption law did not impair the obligation of a contract so as to make it unconstitutional. But on this precise question see opinion of Mr. Justice Swain in *Edwards v. Kearzey*, 96 U. S., at pp. 601-2.

Templeton v. Horne, 82 Ill. 491.

In *Templeton v. Horne*, 82 Ill. 491, it was held: 1. Remedies which the law affords to enforce contracts constitute no part of the contracts themselves, and any mere change thereof by the Legislature that does not amount to a deprivation of all effectual remedy is in no just sense impairing the obligation of the contract. 2. Where a contract under which parties became entitled to enforce a mechanic's lien was made and proceedings to establish the lien were instituted, but no decree pronounced before the redemption law of 1869 went into force, and thereafter a decree was rendered enforcing the lien, it properly conformed to the provision of the redemption act and provided for a redemption from any sale made thereunder, the court saying with respect to the redemption act of 1869, at p. 492:

"No doubt * * * if it had the effect of impairing

the obligation of contracts previously made to that extent would be inoperative and void. But no such results flow from it. All it does is simply to change the mode by which the lien given by statutes for enforcing the performance of a contract is to be established. Other remedies of which the parties might have availed were not changed. Contracts previously made were in no wise affected. Their terms were neither enlarged nor abridged. The lien given the mechanic is purely statutory and does not arise out of any contract. Remedies which the law affords to enforce contracts constituted no part of the law themselves * * * all remedies for enforcing contracts and obligations are within the control of the legislature and any mere change that does not amount to a deprivation of all efficient remedy is in no just sense impairing the obligation of contracts * * *. Independently of the lien given by statute, such creditors may enforce their contracts in any appropriate common law action." Citing *Hall v. Bunte*.

But on this point see *Scobey v. Gibson*, 17 Ind. 572.

Prior to June 4th, 1861, real estate under existing law could be sold at sheriff's sale on execution without any right of redemption. The great war having unsettled things, the legislature of Indiana on the 4th of June, 1861, passed an act providing for the redemption of real estate sold upon execution and forbidding the sheriff's deed to ripen into a title until the expiration of a year from the day of sale.

In the case of *Scobey v. Gibson*, 17 Ind. 572, this act came before the Supreme Court for consideration and was held unconstitutional, so far as it applied to sales on judgments rendered upon contracts existing at and before its passage as in conflict with Art. 1, Sec. 10 of the United States Constitution. Of this, the court said at page 572:

"What is the influence of such a statute upon the collection of debts? Its tendency is to delay. It embarrasses

the collection, because it deprives the creditor of the right which the law, at the date of his contract, gave him of selling the absolute fee of the debtor's real estate.

And the question is, if held to operate upon existing contracts, will the act conflict with that clause of Sec. 10, Art. 1 of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts?"

"Again it is urged that the legislature has a right to change legal remedies; that it is only the obligation of contracts that cannot be impaired; and it is claimed that the redemption law affects the remedy only.

It is freely admitted that the state, for convenience, may change legal remedies; may vary the times of holding courts, shift jurisdiction from one to another, change forms of action; of pleadings and of process, etc.; and that such legislation may, incidentally delay somewhat, the collection of given debts; but such is not the purpose of this legislation, and while its validity is admitted, it may also be asserted, that the legislature cannot, under the guise of legislating upon the remedy, intentionally, in effect, impair the obligation of contracts; and it may be further laid down, that any legislation, professedly directed to the remedy, which deprives a party of one substantially as efficient as that existing at the making of the contract does impair the obligation of the contract."

Referring to *Bronson v. Kinzie* and *Curran v. Arkansas*.

Parker et al. v. Buckner et al., 67 Tex.

In *Parker et al. v. Buckner et al.*, 67 Texas 20, the question of the validity of the act modifying a remedy or the claim that it impaired the obligation of a contract was under consideration, of which the court said at page 23:

"But this takes away neither a vested right nor impairs the obligation of a contract * * *. It is well settled that the legislature may change or modify the remedy for the enforcement of a contract and within certain bounds limit the time for its exercise (authorities) and referring to the language in *Edwards v. Kerzey*, says: 'This is the utmost extent to which authorities go in this

direction. The act in question did not materially impair the remedy nor did it lessen the value of the contract. On the contrary, we think it afforded a better remedy and gave ample time in which to secure its benefits.' ”

Martin v. Huett, 44 Ala. 418 contains language which in the presence of this court as at present constituted we should not have the temerity to read and we forbear commenting on it further than to say that in our opinion it throws no light on the question at issue.

Louisville, etc. Co. v. R. R. Com., 157 Fed. 944

In *Louisville, etc., v. Railroad Commission*, 157 Fed. 944. about all we can observe in this case is that it holds that jurisdiction and powers of a Federal Court of equity cannot be effected by state legislation. That, of course, depends upon the character of the state legislation. If it constitutes a contract that parties have a right to present in a court whether of law or equity, Federal courts are bound to determine the rights existing or denied whether arising in equity cases or at law.

Knight v. Shelton, 134 Fed. 423.

In *Knight v. Shelton*, 134 Fed. 423, if we have not sufficiently discussed this question elsewhere, it is probably sufficient to say that in so far as it lays down a legal proposition not in harmony with the decision by Chief Justice Waite in *Douglass v. County of Pike*, 101 U. S. 687, it is not very controlling and so far as it attempts to overrule the Supreme Court of Indiana in the case of *Byram v. The Board*, 145 Ind. 242, we know of no such jurisdiction conferred upon the distinguished judge out in Arkansas.

Cooley's Constitutional Limitations.

Cooley's Constitutional Limitation does say precisely

what is quoted in appellee's brief at page 41, but Mr. Cooley has already said at page 350:

"But a law which deprives a party of all legal remedy must necessarily be void 'if the legislature of any state were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it there is no question that such legislature would by such act exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the constitution.'"

If the *United States v. Powell*, 151 Fed. 648; *Mobile v. Watson*, and the Dartmouth College case throw any illuminating power on this case we are not fully able to grasp it. All of the sons of 'Old Dartmouth—of whom the writer is one—revere her memory and point with pride to her great case, but it is sometimes suspected that that great case covers "a multitude of sins" not the least of which is the one that it is here cited to uphold.

Summarized the position of appellees learned counsel is this:

- a. A mechanic's lien is a remedy, not a right.
- b. The legislature has created it; *ergo*, the legislature has the right to destroy it. Q. E. D. Or as Job put it: "The Lord gave and the Lord hath taken away; blessed be the name of the Lord."

VII.

THE INDEPENDENT JURISDICTION OF THE UNITED STATES COURTS.

- a. Its duty to follow State Court decisions on questions of local law.
- b. Its right to determine for itself where:
 1. The decisions are conflicting, or,
 2. There are no decisions.

c. It should not reverse the decision of a lower court of the United States made in harmony with recent State Court decisions although those decisions may thereafter be overruled.

(Appellees point sixth—its brief, pp. 5 and 46-8.)

Appellant can have no possible controversy with *Morgan v. Curtenius*, 20 How. 1.

In *Morgan v. Curtenius, et al.*, 20 Howard 1, it was held:
 1. The construction given by state courts to their own statute concerning title to land being a rule of property must be followed by the Circuit Courts of the United States sitting in the same state. 2. Though the state courts may change their views of the statute pending a writ of error from the Circuit Court to this court such a change cannot make that erroneous here which was rightly decided in the Circuit Court whatever effect it may have on other cases in the Circuit Courts. The court saying at page 3:

"But it is argued that though the decision of the Circuit Court was in accordance with established construction of the statutes of Illinois, and the rules of property as then declared by her highest tribunal, yet it has become erroneous because of a change of the law since that time by a decision of the Supreme Court of the state * * * If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois this court might have been compelled to decide whether they considered themselves bound to follow the last decision of that court or at liberty to choose between them but, however, the latter decision may have a retro-active effect upon the titles held under the deed in question, it cannot have that effect upon the decisions of the Circuit Court and make that erroneous which was not so when the judgment of that court was given."

In the case there was no question of the constitutionality of the last decision as impairing the obligation of a

contract under the previous decisions. That question was not considered by the court.

To the same effect is *Burgess v. Seligman*, 107 U. S. 20. In that case the controversy, in that respect differing from the case at bar was between citizens of different states and the court held: 3. The courts of the United States in the administration of state laws in cases between citizens of different states have an independent jurisdiction co-ordinate with that of the state courts and are bound to exercise their own judgment as to the meaning and effect of those laws. 4. Where, however, by the course of the decisions of the state courts certain rules are established which become rules of property and action in the state and have all the effect of law * * * the courts of the United States always regard such rules as authoritative declaration of what the law is but where the law has not been thus settled it is their right and duty to exercise their own judgment * * * and assert the right to adopt their own interpretation of the law applicable to the case although a different interpretation may be given by the state courts after such rights have accrued. 5. But even in such cases for the sake of harmony and to avoid confusion the courts of the United States will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. 6. Acting on these principles of comity the courts of the United States without sacrificing their own dignity as independent tribunals endeavor to avoid and in most cases do avoid any unseemly conflict with the well considered decisions of the state courts.

Nor with *Messenger v. Anderson*, 171 Fed. 785.

In *Messenger v. Anderson*, 171 Fed. 785, it was held where a C. C. A. on writ of error in an action between

citizens of different states has construed a provision of a will in the exercise of its independent judgment there being at the time no settled rule of decision in the state applicable thereto, such court will not reconsider and reverse its decision on a subsequent writ of error in the same case because in the meantime the Supreme Court of the State in a different suit has rendered a contrary decision respecting the same will. The court, judge, now Mr. Justice Lurton saying, at page 794:

"It is impossible to say from it alone—the syllabus—we should be able to treat the decision as a declaration of the settled law of Ohio constituting a rule of property which this court ought to follow. It is apparently no more than an interpretation of a particular will and as such under the cases cited above is not such a decision as we are under obligation to follow as a local rule of property."

And then refers to the Burgess-Seligman case as conclusive of the question and to the *Great Southern, etc. Co. v. Jones*, 116 Fed. 164, 193 U. S. 532, as controlling that court.

Nor with *Kuhn v. Fairmount, etc. Co.*, 215 U. S. 349.

In *Kuhn v. Fairmount, etc. Co.*, 215 U. S. 349, 357, it was held: 1. In administering state laws and determining rights accruing thereunder, the jurisdiction of the federal court is an independent one co-ordinate and concurrent with and not subordinate to the jurisdiction of the state court.

Rules of law relating to real estate so established by state decisions rendered before the rights of the parties accrued as to have become rules of property and action are accepted by the federal court, but where the law has not thus been settled it is the right and duty of the federal court to exercise its own judgment. 3. Even in ques-

tions in which the federal court exercises its own judgment it should for the sake of comity and to avoid confusion lean to agreement with the state court, if the question is balanced with doubt. 4. Where there has been no authoritative state decision rendered by the state court before the rights of the parties had accrued and become final. it is the right and duty of the federal court to assert its own independent judgment. This court, Mr. Justice Harlan, saying at page 360 :

"We take it, then that it is no longer to be questioned, that the federal courts in determining cases before them are to be guided by the following rules. 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the federal court is an independent one not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. 3. *But where the law of the state has not been thus settled*, it is not only the right but the duty of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or where there has been no decision by the state court on the particular question involved*, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."

Præsidio County v. Noel-Young, etc. Co., 212

U. S. 58.

In *Praesidio County v. Noel-Young, etc. Co.*, 212 U. S. 58, it was held: 1. Where officers having statutory authority to issue bonds have also statutory authority to determine whether conditions precedent have been performed certify by recitals therein that the bonds are issued in virtue of the statute, such recitals import compliance with the statute upon which a bona fide purchaser can rely and the obligor cannot against such a purchaser assert the contrary * * *. 4. In respect to doctrines of commercial law, and general jurisprudence, while courts of the United States in questions balanced with doubt will for the sake of harmony lean towards an agreement with a state court as a general rule they will exercise their independent judgment uncontrolled by decisions based on local statutes and usage and where the state court proceeded in part on grounds inconsistent with the decisions of this court in such cases its decisions should not be followed. The court, Mr. Justice Halan saying at page 73:

"It is apparent that the Supreme Court of Texas proceeded in part upon grounds inconsistent with the decisions of this court in cases involving the rights of the holders of commercial paper * * *. But in the present suit and upon the particular question now under consideration it is perhaps immaterial that the learned Supreme Court of Texas did not proceed on the grounds consistent with the settled doctrines of this court on questions of commercial law."

And at pages 74-5:

"But clearly the negotiability of the bonds was not destroyed by the mere bringing or pendency of the suit upon the coupons although the issue in that suit as to the validity of the coupons may have, incidentally involved an inquiry as to the validity of the bonds to which they were attached. It may be that the holder of the negotiable coupons sued on being also at the time the

holder and owner of the bonds may be concluded *as between him and the county*, in a subsequent suit on the bonds by a previous judgment on the coupons on the suit in which the coupons were held invalid because attached to invalid bonds. But one who became a bona fide purchaser for value of the bonds, after the institution of the suit on the coupons, not being himself a party to or having notice of that suit, will not be concluded by the judgment as to the coupons. A suit on coupons and a suit on the bonds are based on different causes of action."

And concluded at page 78:

"We hold that upon the present record the plaintiff company is to be taken as having purchased the bonds here in suit before maturity and for value without notice of any circumstances indicating that their validity was or could be impeached."

It appears that the Chief Justice dissented but the grounds of his dissent are not made known.

We have labored in vain in this case, if we have not satisfied the mind of this court not that the Supreme Court of Indiana did not hand down the decisions in the Brennan case and the cases following it and thereby deprived the appellees in these cases of rights to which they were justly entitled, but that so far as this appellant is concerned the opinions were void as impairing the obligation of the contracts under which this appellant furnished its money and materials and performed its labor in the full belief that the Constitution of the United States protected it in its rights.

This is the great court to which parties must in the end come for their protection and appellant has come in the full confidence that in this great forum its wrongs will be righted, its interests preserved and protected, its contract rights and remedies relieved from the impairment worked by the Supreme Court of Indiana with the co-

operation and assistance of the Circuit Court of the United States for the District of Indiana "for which it will ever pray, etc."

Respectfully submitted,

A. S. WORTHINGTON,
WILLIAM A. KETCHAM,
Solicitors for Appellant.

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UNITED STATES OF AMERICA, SCT.

IN THE

Supreme Court of the United States

October Term, 1913.

File No. 23321. Term No. 358.

MOORE-MANSFIELD CONSTRUCTION COMPANY,

Appellant,

v.

ELECTRICAL INSTALLATION COMPANY ET AL.,

Appellees.

BRIEF OF APPELLEE THE MARION TRUST
COMPANY, TRUSTEE,

W. H. H. MILLER,
C. C. SHIRLEY,
S. D. MILLER,
W. H. THOMPSON,

Solicitors for Said Appellee.



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Appellees.

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BRIEF OF APPELLEE THE MARION TRUST COM-
PANY, TRUSTEE.

I.

STATEMENT OF THE CASE.

The statement of the case by the appellant is substantially correct, we think, except that it omits certain additional facts which are important as affecting the question whether or not the appellant waived its right to assert and enforce a

mechanic's lien for work done in constructing the railroad in question, assuming that in the absence of such waiver it had a right to such lien under the statutes of Indiana as interpreted by the highest court of that State.

In this connection we wish to direct the court's attention to the fact that in the original contract of February 21, 1906, between the Traction Company and appellant, it was recited *inter alia* that the Traction Company proposed to set aside one million five hundred thousand dollars par value of the bonds secured by mortgage on all its property then owned or thereafter to be acquired for the purchase of property and to pay the cost of constructing, equipping and putting in operation that part of its line of road extending from Indianapolis to the City of Crawfordsville; and that it had already entered into an underwriting contract with certain parties for the sale of this million and a half dollars of bonds for the purpose aforesaid. (See preamble of contract, page 36 printed record.)

By the first paragraph of the contract proper the appellant undertakes to complete the work "free and clear of any claim and demand created by or against the Construction Company, for which any lien has been or could be taken upon the railroad or any other property of the Traction Company or for which said Traction Company or its railroad or any other property has been or could be made liable."

By the second paragraph, provision is made for the commencement of the work within ten days after the disposition of the bonds. The third paragraph recognizes the purpose of the Traction Company to use \$187,000 of said bonds and \$375,000 of stock to purchase the right of way then owned by its predecessor, Consolidated Traction Company.

The contract of June 6, 1906 (Exhibit AA), from its preamble to its conclusion recognizes the necessity of disposing of this million and a half par value of bonds free from any

possible underlying lien, in order that the proceeds thereof might be used in the manner contemplated by the contract of February 21, 1906. It again recites the setting apart of a million and a half of bonds to construct and equip that part of its line extending from Indianapolis to Crawfordsville, together with the further fact that \$900,000 par value of such bonds have already been subscribed for in good faith by responsible parties.

By paragraph three it is agreed specifically that the work to be done by appellant "shall be completed free from any claim of indebtedness, the holders of which may, under the laws of the State of Indiana, or of the United States, be entitled to a lien of any kind against any of the property of the Railway Company, *so that the Railway Company's issue of first mortgage bonds herein mentioned shall be the only indebtedness against said Railway Company upon the completion of the construction and equipment of its line between Indianapolis and Crawfordsville, Indiana.*" (Our italics.)

It is significant that by paragraph eleven the party undertaking to perform the electrical construction and furnish the electrical equipment was not to begin work until the entire million and a half dollars of bonds so set aside had been certified by the trustee, and that it was to receive \$225,000 of the bonds as a part of the consideration for the work to be done by it.

II.

ARGUMENT.

The appellee insists that appellant is not in a position to assert a mechanic's lien upon the railroad of The Indianapolis, Crawfordsville and Western Traction Company, for the following reasons:

First: Appellants expressly agreed by the contracts exhibited, with its cross-bill of complaint, to construct the work free from any such liens, in order that the bonds secured by the deed of trust to appellee should be a first lien upon said property. Any possible right to a mechanic's lien, which might have existed in its favor, was thereby expressly waived.

Second: The master having, in his report, set forth a copy of the contract containing this waiver, the legal effect thereof was a question of law for the court, and no exception to any language of the master, tending to place a construction on such contract, was necessary. The order of reference merely directed the master to report the facts.

Third: The mechanic's lien law of 1883 (Acts 1883, p. 140), as amended in 1889 (Acts 1889, p. 257), which gave a lien to "laborers," does not apply to contractors, and if so construed, is void under Section 19 of Article IV, of the Indiana Constitution, which reads as follows:

"Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof, as shall not be expressed in the title."

Section 8305, Burns R. S. 1908, giving liens to persons

performing work in the construction of a railroad, is also inapplicable to contractors.

Fourth: At the time the work in question was being performed, there was no statute in force in the State of Indiana entitling a corporation to assert or maintain any lien.

Fifth: Mechanic's lien laws are remedial, and even if the law, as interpreted at the time the contract in suit was executed, authorized corporations, contractors and subcontractors, to enforce liens against railroad property, the State violated no provision of the Federal Constitution in taking away that remedy, as appellant claimed it did, by the decision of its Supreme Court in the case of *Indianapolis Northern Traction Company et al. v. Brennan*, 87 N. E. 215; and in the case of *Ward v. Yarnelle*, 173 Ind. 535-560.

Sixth: At the time this case was decided by the Circuit Court, the Supreme Court of Indiana had, by its latest decision on the subjects, declared the law to be as stated in the foregoing third, fourth and fifth propositions; and, although that court has, since the final decision of this cause in the Circuit Court, overruled its previous decisions upon those points, this court should not follow the later decision of the State Supreme Court, because (a) the decision of the Circuit Court was not erroneous when rendered, and can not be made erroneous by the subsequent action of the State Court; and (b) this court will, when the decisions of the State Court are conflicting, exercise an independent judgment, and the decision of the Circuit Court being right, as well as in harmony with the last declaration of the State Court, should be affirmed.

We now propose to consider these six propositions in the order of their statement, although it seems inconceivable to us that the first can fail to defeat the appeal.

FIRST.

APPELLANT EXPRESSLY WAIVED ITS RIGHT TO ASSERT A MECHANIC'S LIEN, IF ANY SUCH RIGHT EXISTED.

As already indicated in our statement of the facts at the commencement of this brief, the original contract between the railroad and the appellant, for the construction of that part of its line between Indianapolis and Crawfordsville, recited the issue and setting aside of one million five hundred thousand dollars bonds, par value, of the Railroad Company, for the purpose of purchasing property and paying for the work of constructing and equipping the line.

The appellant undertook, by paragraph one of the contract of February 21, that the road should

“be completed to the acceptance of the engineer and the Executive Committee of the Board of Directors of The Traction Company, and to be free and clear of any claim or demand created by or against the Construction Company, for which any lien has been, or could be taken upon the railroad, or any other property of the Traction Company, or for which said Traction Company, or its railroad, or any other property, has been, or could be made liable.” (Printed Record, p. 37.)

By paragraph two, it was further provided that the work of construction should be commenced within ten days after the sale of the bonds and stock of the company by the brokers.

By paragraph three, it is recited that a hundred and eighty-seven thousand dollars of these bonds, together with stock amounting to three hundred and seventy-five thousand dollars, were to be used in buying the right-of-way of the Consolidated Traction Company.

So that it was clear from the beginning that these bonds

were to be placed on the market and sold, and the proceeds thereof used in acquiring property and paying for the work of construction and equipment; and that the work was not even to begin until ten days after the bonds were disposed of.

Now, it would seem to be perfectly obvious that these bonds could not be placed upon the market and sold, nor used in acquiring the right-of-way, unless the purchasers were to be protected against the prior liens in favor of contractors, and especially against the very party executing the agreement from which we have quoted.

But afterward, on June 6, 1906, a tripartite agreement was executed by the Traction Company, The Electrical Installation Company and appellant, for the installation of the electrical equipment of the road. It is true that appellant is not named in the introductory paragraph of this contract, as a party thereto, but by paragraph thirteen it is expressly introduced as a party and executes the contract with the same formality as the other parties.

Paragraphs three and thirteen of this contract leave absolutely nothing of appellant's contention that the language of the two instruments falls short, in a legal effect, of a waiver.

Section three, of the contract of June 6, 1906, which appears at page 40 of the Printed Record, has already been quoted.

By section eleven, of the same contract (Printed Record, p. 44), it is further provided:

"The Contractor shall not be required to commence work or delivery of materials under this contract until all of the bonds of the Railway Company covering its line between Indianapolis and Crawfordsville, Indiana, have been signed and certified by the Trustee, and the Railway Company shall thereupon cause to be set aside in the hands of the Trustee, all of the bonds and stock to be issued to the Contractor, or its order, under this agreement," etc.

Now, by paragraph thirteen, the appellant expressly joined in each and every one of the covenants contained in the contract of June 6th, in the following language:

"The Moore-Mansfield Construction Company hereby approves all and singular the terms, agreements, provisions and conditions of this contract, and the specifications in connection therewith, and agrees that it will do all acts necessary to the carrying out of this agreement, so far as the same relates to the Moore-Mansfield Construction Company, and it is agreed that the covenants of this agreement shall extend to and bind the successors, assigns and representatives of the Railway Company and contractor." (Printed Record, p. 45.)

It would be difficult, we think, to frame language that would more definitely and certainly express the purpose of the contracting parties to provide against the possibility of appellant's asserting a mechanic's lien, than that employed in the two instruments.

It is true, as said by the learned counsel for appellant, that a waiver should not be implied from doubtful or ambiguous words; and if ever that rule was fulfilled to the utmost, it was and is fulfilled by the language above quoted.

It is stated in the brief of appellant that counsel for appellee did not raise the question of waiver until the argument on the decree, and it is inferred from this assumed circumstance that the language relied upon as a waiver is obscure and ambiguous. However, the record shows that the learned counsel who prepared appellant's brief is not correct in the statement of his premise, nor would the conclusion follow, even if the premise were correct.

It is true that no demurrer was filed to appellant's cross bill, but on the 2nd day of February, 1910 (Printed Record, p. 98), the appellee filed an amended answer, setting up the

express waiver contained in the contract of June 6th as a defense to appellant's cross bill, and by stipulation (Printed Record, p. 118) the averments of the answer as to the waiver were carried into the cross bill of the appellee.

The order of reference was not entered until the 24th day of October, 1910, so that appellee's theory of a waiver by appellant was not an after-thought, but was relied upon and urged from the beginning.

It is doubtless true that the amendment to appellee's answer was wholly unnecessary for the purpose of introducing this defense, because both instruments containing the waiver were made exhibits with appellant's cross bill, and the legal question would have been clearly presented by the proofs and report of the master without the amendment to appellee's answer and cross bill.

But, after consideration, appellee deemed it advisable to expressly tender the issue of waiver, and accordingly did so in the early stages of the case, as above shown.

It is well settled that an agreement to waive a mechanic's lien is valid, and that no formal language is necessary to accomplish that result. It is sufficient if from the instrument or language used, the intention of the parties clearly appears.

Sheid v. Rapp, 121 Pa. 593 (15 Atl. 652);

Brzezinski v. Neeves, 93 Wis. 567 (67 N. W. 1125);

Matthew v. Young, 16 Misc. Rep. 525 (40 N. Y. Sup. 26);

Long v. Caffery, 93 Pa. St. 526;

Cushing v. Harley, 127 N. W. 441;

Pennork v. Locust Realty Co., 73 Atl. 930 (224 Pa. 437);

Burger v. F. R. Moss, etc., Co., 225 Pa. 400 (74 Atl. 219);

- Sprague v. Providence Savings, etc., Co.*, 163 Fed. 449;
Grant v. Strong, 18 Wall. 624;
Gray v. Jones, 81 Pac. 813;
Commonwealth, etc., Co. v. Ellis, 43 Atl. 1034;
Schrader v. Galland, 134 Pa. St. 277 (19 Atl. 632);
Geo. B. Swift Co. v. Dolle, 39 Ind. App. 653;
Kneeland's Mechanic's Liens, Secs. 136-137;
McHenry v. Knickerbocker, 128 Ind. 77;
Clawson v. Billman, 161 Ind. 610;
Miller v. Decker, 36 Ind. App. 595;
Bowen v. Aubrey, 22 Cal. 596;
Ludowici, etc., Co. v. Pa. Inst., etc., 116 Fed. 661;
Stoneback v. Waters, 48 Atl. 296.

In *Sheid v. Rapp, supra*, the plaintiff had agreed to erect the defendant's building for a certain sum, and had also covenanted, "that he will not suffer or permit to be filed * * * * * any mechanic's lien or liens against the said building for a period of six months after its completion."

In holding that the above language constituted a waiver on the part of the contractor, of any right to file a lien in his own favor, the Supreme Court of Pennsylvania said:

"The sole question is whether the Contractor, by his covenant, waived the right to file, or authorize a lien to be filed in his own favor. We think he did. While the phraseology of the stipulation is different from that in *Long v. Caffery*, 93 Pa. St. 526, the legal effect of both is the same. The lien under consideration was necessarily filed by the plaintiff below, himself, or by his sufferance or permission. In either case it was as clearly a violation of his covenant as if he had suffered or permitted any mechanic or material man to file the lien."

In *Commonwealth, etc., Co. v. Ellis*, 43 Atl. 1034, the Supreme Court of Pennsylvania held that the following language constituted a waiver on the part of the principal contractors:

"It is hereby further agreed that there shall be no liens entered or filed by the subcontractors, or any other person for or an account of any work, labor or materials done or supplied in or upon said building."

In the case of *Brzezinski v. Neeves*, 93 Wis. 567, the following clause of the construction contract was held valid by the Supreme Court of Wisconsin:

"It is further agreed that the said party of the first part hereby waives all right of lien in the premises, which he may have by virtue of the Statutes of the State of Wisconsin, and that all persons employed by him to work upon said premises, shall sign, execute and deliver a release and waiver of all liens which they may be entitled to under the Statutes of this State, and that the waiver of liens hereto attached and made a part hereof, shall be signed and executed by all persons employed by the party of the first part, under this contract; that the waiver of such liens being the essence of this contract, and part of the consideration for entering into the same by the parties of the second part."

In *Grant v. Strong*, *supra*, this court said:

"The question whether a lien is obtained or is displaced when it once attaches, is largely a matter of intention, to be inferred from acts of the parties, and of the surrounding circumstances."

This language was used with reference to a case where the waiver was implied from the acceptance of other security.

The intention of the parties in the case at bar is made far more manifest than in the case of *Grant v. Strong*, because it

is not only expressly agreed that no liens shall be asserted, but the purpose of the agreement is likewise expressed in unmistakable language, viz.: so that the bonds of the Traction Company, which were to be put on the market and sold before the work was begun by appellant, should constitute the only indebtedness against the road when completed.

It is intimated in appellant's brief that the effort of appellee to have the bonds secured by its mortgage, paid in preference to the balance due appellant on its construction contract, is tinctured with "high finance."

We are not able to appreciate the application of the phrase; but if appellant can deliberately engage, by two separate contracts in writing, that a million and a half, par value, of first mortgage bonds, shall be issued and sold, in order to procure funds to purchase property and construct and equip the railroad in question, before appellant begins the work of construction, and that thereafter appellant will build and equip the road and deliver the same free from liens of all kinds, *so that the bonds so issued shall be the only indebtedness against the property*, and then, after the bonds are sold and paid for, disregard its oft reiterated covenant and enforce a mechanic's lien on the property, appellant needs no instruction in the art of "high finance."

In *Gray v. Jones, supra*, the contract provided, among other things:

"And the said party of the second part further covenants and agrees that he will not allow any lien or liens to be filed against the said building and premises, or any part of either thereof, and further, that the said building and premises, and every part of either thereof, shall be at all times free from any and all liens."

The Supreme Court of Oregon construed this contract as a waiver on the part of the original contractor, of his right

to assert a mechanic's lien on the property. In so holding, the court said:

"So too, a covenant of a contractor to keep a building free from liens is a waiver of the right to file, or cause to be filed, a claim for liens in his own favor."
(Citing authorities.)

In few, if any, of the cases cited to the point now under consideration was the language of the waiver nearly as explicit as that employed in the case at bar, aside from the reference to the bonds proposed to be issued and sold. And yet, the court held in each case that the waiver was effected, although in some instances only implied. In the case at bar the language would be quite sufficient, even if the parties had not mentioned the issue of the bonds as the controlling object to be accomplished. But here, in addition to an express agreement that no lien shall be filed, the party leaving nothing to inference or intendment has made a certainty doubly certain by declaring that the waiver is made so that "*the Railway Company's issue of first mortgage bonds, herein mentioned, shall be the only indebtedness against said Railway Company upon the completion of the construction and equipment of its lines between Indianapolis and Crawfordsville, Indiana.*" (Our italics.)

SECOND.

NO EXCEPTION TO THE MASTER'S REPORT WAS NECESSARY TO
RAISE THE QUESTION AS TO THE LEGAL EFFECT
OF THE WAIVER.

It is suggested in appellant's brief that the finding of the master to the effect that at the time it constructed the railroad

in question, appellant believed it was entitled to enforce a mechanic's lien therefor, concludes the question of waiver against appellee, in the absence of an exception to that part of the master's report.

This theory, which, as already stated, is barely suggested by appellant, is wholly untenable. This finding of the master must be considered in one of two aspects:

First: As an expression of the master's belief that appellant did not understand the legal effect of the contract as executed; or, second, as the master's construction of the legal effect thereof.

In either case the contracts themselves control, and the court alone can declare their legal effect. It is wholly unimportant whether appellant believed his agreement not to file a lien was binding upon him, or not; and it is equally unimportant whether the master regarded this agreement as binding upon appellant, or not.

The only important thing in this connection is the fact, as found by the master, that both contracts were executed by appellant. The fact of execution being found, and the contracts embodied in the master's report, it was the plain duty of the court to give effect to the written instruments, according to their legal meaning, without reference to what appellant may have believed as to their validity or construction.

This would have been true even if the case had been one of general reference, and much more under a reference limited to the facts. The construction of a written contract is not a *fact*, but a question of law.

There is no issue in this case, and no finding by the master, that either fraud or mistake entered into the execution of either of the instruments in question; and no finding that the peculiar views ascribed to appellant with reference to the legal effect of the contract were ever communicated to the appellee

or any bond holder. The contracts must, therefore, speak for themselves.

- Northern Assurance, etc., Co. v. Grandview Building Association*, 183 U. S. 308-361;
American and English Ency. of Law, 2nd Ed., Vol. 7, p. 112;
American Insurance Co. v. McWhirter, 78 Ind. 136;
Thompson v. Ray, 46 Ala. 224;
Precatt v. Cooper, 37 La. 553;
Holmes v. Hall, 8 Mich. 66;
Allen v. Galloway, 30 Fed. 466;
Payne v. Smith, 33 Minn. 495 (24 N. W. 305);
Ridlæven v. Davis, 51 Ver. 457-529;
Trigg v. Reed, 24 Tenn. 520 (42 American Dec. 447);
Citizens National Bank v. Judy, 146 Ind. 322.

In the case of *The Citizens' National Bank of Attica v. Judy*, 146 Ind. 322, a cross-complaint was filed by the appellee, Central State Bank, asking the correction of a mistake in a mortgage executed to it by Judy, and for a foreclosure of the same as corrected. The special findings showed that at the time such mortgage was executed there was no agreement between said bank and said Judy as to what land should be embraced in said mortgage, and that at no time prior to the execution of such mortgage, or at any time, was anything said by the cashier of said bank or said Judy as to what land should be embraced in such mortgage; that the cashier of said bank when he drafted such mortgage intended to embrace therein all the lands then owned by the defendant Judy, and that the officers of the bank supposed and understood that the mortgage as executed did embrace all of such

land and that the appellee, Judy, at the time he executed such mortgage supposed that the same contained a description of all said real estate, and that Judy intended to embrace and include in such mortgage all of said real estate.

The court below entered a decree reforming the mortgage and foreclosing it. An appeal was taken and the judgment of the court below was reversed, the Supreme Court holding that the findings were insufficient to sustain a reformation of the mortgage on the ground of mutual mistake. Among other things, it said :

"It is clear from the finding that there was no contract, express or implied, by the words or acts, or both, except the mortgage itself. It is true, as insisted by appellee bank, that the court found that the cashier intended, when he drafted the mortgage, to embrace therein all the lands then owned by Judy, set out in the first finding, and that the officers of the bank supposed and understood that the mortgage so executed did embrace all such lands, and that said Judy, at the time he executed the mortgage, supposed the same contained a description of all his real estate described in the first finding of the court, and that he intended to embrace and include and describe all of said lands in such mortgage. The finding shows that the intention and supposition and understanding of the officers of said bank as to what lands of Judy were embraced in the mortgage were unknown to Judy, except as he learned the same from the mortgage itself, and that the intention and supposition of Judy as to what lands were to be embraced in the mortgage were unknown to the bank and its officers.

"The mere fact that the cashier of said bank intended to include all the real estate of Judy in the mortgage, and the officers of the bank supposed and understood that the mortgage so executed did embrace all such lands, such belief, supposition and understanding not being known to Judy when he executed the mortgage would give the bank no right to have such mortgage

corrected so as to describe all of such lands; neither would the mere fact that Judy intended to execute a mortgage on all such real estate, and supposed he had done so, such intent and supposition being unknown to the officers of said bank when said mortgage was executed, give any such right. If there was no contract, express or implied, that the mortgage should include all of Judy's real estate, as alleged in the cross-complaint, the mere fact that each intended to include all such land in the mortgage, and believed it had been done, neither party having any knowledge of the intent or belief of the other, when in fact the same had not been described, would not entitle either party to reform such mortgage against the other, for the reason that there was no contract, express or implied, as to what real estate should be included, nor any arrangement or understanding except as shown by the mortgage itself."

In *Egan v. Clasbey*, 137 U. S. 654, an action at law was brought to recover the value of certain shares of stock in which there was involved the construction of a written contract.

A jury was waived and the case was tried by the court, which stated its findings of facts and conclusions of law. On appeal Mr. Justice Lamar, speaking for the court, said:

"We find no exceptions in the record and the only error assigned is, that the court erred in not giving judgment in favor of the plaintiff, as a necessary legal conclusion from the findings of fact, the pleadings and the proper interpretation of the contract sued on."

The Supreme Court, in affirming the judgment of the court below, looked to the proper interpretation of the contract under the evidence, and this in the absence of any exception whatsoever.

In *Waterman v. Banks*, 144 U. S. 394, the plaintiff in the

court below filed a bill to require the specific conveyance by the defendant of an interest in a mining property. The rights of the parties depended upon the construction of certain contracts in writing, consisting of letters and a memorandum. The questions of fact were referred to a master, who made his report and the decree recited that each party waived his right to except thereto. It was urged that this waiver showed that the decree was by consent, but the Supreme Court denied this proposition.

In the opinion of Mr. Justice Harlan, it is said:

"The Master made his report, and the final decree recites that each party waived the right to except to it. This waiver is relied upon as showing that the final decree was by consent, and, therefore, not to be questioned in this court. This contention is overruled. The waiving of exceptions to the master's report meant nothing more than that the appellant did not dispute its correctness in respect to the amount of the profits realized from the property. This waiver had no reference to the fundamental inquiry as to whether the plaintiff was entitled to a conveyance. But as, for the reasons stated, R. W. Waterman was not bound to convey—the time having elapsed in which a conveyance could be rightfully demanded—the entire decree falls."

In the case last cited, one of the important things was the construction of the contract between the parties and, on page 401 of the opinion, the court says that it is clear from the face of the writing, without calling to its aid the circumstances under which it was executed, that J. S. Waterman did not stipulate for a present interest in the property. The decision of the court below was reversed and, although the parties had expressly waived their right to except to the master's report, the legal effect of the contract was passed on by the Supreme Court.

In *Von Platen & Dick et al. v. Winterbotham*, 67 N. E. 843, the master states in his report that he based his conclusions that the law did not allow a lien to either of the complainants upon the fact that no specific time was fixed in either of the sub-contracts for the performance of the same, or for payment. Both the petitioners and the intervening petitioners filed exceptions to the conclusions of the master on the question of law. The Supreme Court of Illinois held that these exceptions were unnecessary. Among other things, it said:

"The exceptions as to the legal conclusion of the master were neither necessary nor proper. Where the master states the facts correctly, it is not necessary for one who claims that the master is mistaken as to the legal consequences of the facts to except to the report. Exceptions relate to matters of fact, and the question whether the master has drawn in incorrect legal conclusion from the facts will be heard without exceptions, 2 Daniell's Ch. Pr. Sec. 1310; *Hurd v. Goodrich*, 59 Ill. 450; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422."

And the Supreme Court of Illinois reaffirmed the same principle in *Williams v. Spitzer*, 68 N. E. 49, 50, where it is said:

"It is urged by defendant in error that plaintiffs in error are bound by the master's report, because no exceptions thereto were filed in the trial court. The decree recites the sustaining of objections by the court to the master's report, but no exceptions appear in the files. It is not necessary that there should be any exceptions to the opinions of the master upon questions of law, or his recommendations relating to such questions. Exceptions must relate to findings of fact, and exceptions are not necessary to raise the question *whether the findings of fact justify a particular decree.*" (Our italics.)

Even if the master had expressly stated as a conclusion of law that the provisions of the contracts in question did not amount to a waiver no exceptions would have been necessary under the two decisions last above quoted.

The position of the parties would have been precisely the same here as in those two cases; because under the reference the master's authority to bind the court by any conclusion of law he might state would be as ineffectual as that of the master under the Illinois doctrine, above stated.

But in this case the master has not stated as a conclusion of law that there was no waiver; he has merely found that the Moore-Mansfield Construction Company believed it had a right to file a mechanic's lien and that it relied upon such belief, and that it furnished the materials upon the faith of such reliance.

Therefore, the position of The Marion Trust Company, trustee, is infinitely stronger than that of the prevailing parties in either of the above cases.

In *Von Tobel v. Ostrander*, 42 N. E. (Ill.) 152, there was a proceeding to enforce a lien under the provision of the Illinois statutes which requires every creditor or contractor, desiring to avail himself of the provisions of the act with reference to a mechanic's lien, to file a claim with the clerk of the Circuit Court within four months after the last payment shall have become due and payable.

The case was first referred to a master to take and report the evidence, and upon that report being made it was again referred to him to state and report his conclusions. He found and reported among other things that the notice of such lien was filed ten months after the last lumber had been sold and delivered, and that notice of such lien had not been filed in the recorder's office within four months after the last of said lumber had been furnished, as required by law; but that the defendant, Ostrander, had purchased all of said premises on

a certain day, knowing of the filing of the notice. The master recommended the decree in favor of the lienor. It was insisted that in the absence of exceptions to the findings of the master the defendant was precluded from controverting his legal conclusion that the materialman had a right to the lien. The Supreme Court of Illinois denied this condition, and in so doing, said:

"It is insisted, however, by appellant, that the question here raised is not properly presented, for want of exceptions to the master's report; and a considerable portion of appellant's argument is devoted to a discussion of the proper practice in excepting to a master's report. We do not feel called upon to inquire whether these exceptions filed before the master covered the point in question, or whether these exceptions were properly renewed before the court. It was said in *Hurd v. Goodrich*, 59 Ill. 456: '*Where the master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the master's finding to except to the report as the question decided by the master may be opened, upon further directions, without exceptions;*' citing 2 Daniell, Ch. Prac. 1492. So, here, the decision does not question the correctness of the master's finding of facts, but simply holds that, under these facts, the decree of the circuit court is erroneous." (Our italics.)

In this case, the master did not make or report any conclusions of law. What he did was to find that the parties had executed the contract, which contains this waiver of a mechanic's lien, and that in so doing, the Moore-Mansfield Construction Company relied upon the fact that it was entitled to a mechanic's lien under the laws of Indiana, and that it would not have executed said contract except for such reliance. It is entirely possible for the court to reconcile these findings upon the theory that the Moore-Mansfield Construc-

tion Company executed the contract, by which it must be bound, without taking the care to discover whether there was waiver in it; but whether these propositions are reconciled or not, the point that we make here is that giving to the master's finding all the weight that it could possibly be entitled to, it was unnecessary to except thereto, because, admitting the facts found to be true, they could not affect or overturn the execution of the contract, because there was no issue or finding of mutual mistake or fraud, and no evidence even tending to show either.

The master having under the allegations of the bill no right to find any facts showing fraud or mutual mistake in the execution of the *tri-partite* agreement, no exception was necessary to his report if he had found such facts. The same rule applies where all that is found is an uncommunicated belief on the part of one of the contracting parties.

The Supreme Court of Alabama, in the case of *Levert v. Redwood*, 9 Porter, 79, 94, in discussing the scope of a master's report and the question of excepting thereto, says:

"The rule is very clear, that a reference will not authorize a report more extensive than the allegations and proof will warrant (*Consequa v. Fanning*, 3 John. Ct. R. 527), as is also that which declares, that a report, erroneous on its face, may be enquired into without any exception taken."

To the same effect see,

Branger v. Chevalier, 9 Cal. 353.

In the case of *The Citizens National Bank of Attica v. Judy et al.*, 146 Ind. 322-349, the cross-complainant sought a reformation of the contract with reference to certain real estate and the finding of the court was that Judy and the offi-

cers of the bank intended to include in said mortgage not only the real estate described in the cross-complaint, but also other real estate. This finding was outside the issues of the cause, and the Supreme Court of Indiana said, with reference thereto:

"To the extent a special finding is outside the issues in a cause it is a nullity and can give no support to a conclusion of law thereon. *Burton, Rec., v. Morrow*, 133 Ind. 221, 226."

It is said by Mr. Daniel, in Vol. 2 of his work on Chancery, Pleading & Practice (4th Ed.) page 1310:

"Where the master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the master's finding, to except to the report, as the question decided by the master may be opened upon further directions without exceptions. So where facts are so clearly stated in a report as necessarily to involve a particular consequence, it is for the court to act upon the facts so reported, and it will not be a proper ground of exceptions that the master has omitted to point out the consequence."

The text of Mr. Daniel finds support in the following cases:

Hurd v. Goodrich, 59 Ill. 450, 456;

McMannorny v. Walker, 63 Ill. App. 259, 277.

In *Adams v. Claxton*, 6 Vesey Jr. 226, the Master of the Rolls says:

"The other question arises in consequence of a reference to the master to inquire to whom a policy of insurance upon Wood's life, or the money that may be received thereon, belongs. The report states all the circumstances and concludes, that the master conceives, the testator Wood did by that paper writing so appropriate the benefit of the policy, that the persons inter-

ested under the will of Bayfield have a right to the benefit of the money. No exception is taken to the report; but the whole matter appears upon the face of it; and, therefore, it is contended that it is open to inquiry whether the master's conclusion is right; and I apprehend it is so open."

For error appearing upon the face of the report, it may be corrected without any exception.

French v. Turner et al., 10 Grattan 513;
Hyman, Moses & Co. v. Smith, 10 W. Va. 298,
 317, and authorities there cited.

And in this connection the court may look to the pleadings to determine whether there is error in the report.

Kester v. Lyon, 40 W. Va. 161, 165-166, 20 S. E.
 933.

In *Monohan v. Fitzgerald*, 62 Ill. App. 192, the cause, which was an action to foreclose a mechanic's lien, was referred to a master, who found an omission by appellants to perform their contract and yet recommended a decree in their favor. There was no exception to the facts found, to the conclusions of fact of the master.

The court said:

"The objection that appellants were not, upon the facts reported entitled to a decree, could be made by the appellee when a decree was applied for."

In *Richmond Natural Gas Co. v. Enterprise Natural Gas Company et al.*, 31 Ind. App. 222, the question of fact before the court was whether or not the appellant had violated section 7508 Burns 1901, providing that it shall be unlawful

"To use any device for pumping or any other artificial process or appliance for the purpose or that shall have the effect of increasing the natural flow of natural gas from any well, or of increasing or maintaining the flow of natural gas through the pipes used for conveying and transporting the same."

There was a special finding of facts which showed that by the operation of the pumps much more gas was utilized from the wells at the point of consumption than could have carried to that point under the natural rock pressure.

The finding further showed, however, that not so much gas was carried to the point of consumption, even by the use of pumps as would have flowed from the open mouth of the well if it had been allowed to escape without artificial retardation into the open air.

The court found as the ultimate facts in express terms that appellant did, by the use of the artificial appliances or pumps, increase the natural flow of gas from the wells.

The case was appealed upon the special finding of facts alone, the evidence not being in the record, and it was contended on behalf of the appellee, as here, that the conclusion of the court that the pumps in question did increase the flow of gas from the well was conclusive in the absence of a motion for a new trial, or any other question presented by the evidence.

The court answered this contention as follows:

"While the court found, as an ultimate fact, that the use of the pumps has the effect of increasing the general flow of gas from the wells, it also found the primary facts from which it appears that the use of the pumps would not increase the amount of gas coming from the wells through the natural laws of flowage. In such case the ultimate fact will be disregarded on appeal."

(Citing numerous authorities.) (Our italics.)

The judgment was accordingly reversed with instructions to state a conclusion of law in appellant's favor.

Even if there had been a general reference to the master in this case, and he had definitely found that there was no waiver by the Moore-Mansfield Construction Company, the court would, nevertheless, be bound by the terms of the contract to disregard the ultimate conclusion reached; because the express terms of the contract sued on would overthrow any such conclusion.

Certainly, the case of Moore-Mansfield Construction Company would be infinitely stronger if supported by a definite conclusion of the master that it had not waived its rights to assert a mechanic's lien than it is now, supported only by the general statement that it believed the law entitled it to assert a lien, relied upon such belief, and furnished the materials and labor upon the faith of such belief and reliance; and yet, under the doctrine of the Richmond Natural Gas Company case, fortified by the authorities therein cited, such a conclusion however broad and unequivocal would be controlled by the terms of the contract incorporated in the master's report.

Smith, Trustee, v. Wells, etc., 148 Ind. 333, was a case involving the foreclosure of two mortgages; one of which it was claimed had been released. The court found the facts specially, and among these special findings of fact was one to the effect that Wells, the chief owner of one of the corporation mortgages, had no authority to release the mortgage.

But the findings also showed that he had acted as the general business manager of the corporation for a considerable time with knowledge of the directors, etc., and the Supreme Court, in considering the effect of this ultimate fact that Wells had no authority, as found by the court, said:

"The question of the effect of the court's general statement that Wells had no authority to release the

mortgage has been discussed. As to whether that statement was a conclusion of law, or the statement of the ultimate fact and whether it precludes further inquiry by this court have been discussed. We have no doubt that the statement was intended as of the ultimate fact, but where the primary facts are stated and they lead to but one conclusion the statement of the ultimate fact will be disregarded, since a statement of the ultimate fact is required only where from the primary facts, either of two conclusions may reasonably be drawn.

(Citing authorities.)”

In the case at bar it is unnecessary to repeat that no two inferences can be reasonably drawn from the findings that the two contracts sued on by Moore-Mansfield Construction Company were duly executed. Either these contracts amount to a waiver or they do not; if they do not amount to a waiver, then no finding as to the belief or reliance of the Moore-Mansfield Construction Company was necessary *upon the issue as to whether or not there was a waiver*. Indeed, the finding as to the belief and understanding of the Moore-Mansfield Construction Company as to the law, and its reliance upon the same, and the fact that it furnished the labor and materials upon such reliance, relate to the question as to whether or not the contract rights were impaired by the departure of the Supreme Court in the Indianapolis Northern case, from its previous decisions, touching mechanic's liens. This finding bears no relation whatever to the question as to whether or not there was a waiver of such right; evidence of what the Moore-Mansfield Construction Company believed, or what it relied upon would have been totally irrelevant if the only issue being tried had been whether or not it had waived its lien, for the reason that it would have been an attempt to vary the terms of the written instrument by parol evidence as to what one of the parties understood or believed.

THREE.

NO MECHANIC'S LIEN IN FAVOR OF CONTRACTORS.

The title of the Act under which appellant seeks to maintain its lien is as follows: "An Act concerning liens of mechanics, laborers and material men amending sections 1, 2, 3 and 6 of 'An Act entitled an Act concerning liens of mechanics, laborers and material men approved March 6, 1883,' repealing section 5 of said Act, amending section 1 of an Act entitled 'An Act concerning liens of mechanics, laborers and material men approved April 13, 1885,' repealing all laws and parts of laws in conflict therewith and declaring an emergency."

In *Indianapolis Northern Traction Company v. Brennan*, 87 N. E. 215, 220, it was contended by appellant that "the title of the mechanic's lien statute of 1883 is not broad enough, under the constitutional provision to which we have referred, to authorize thereunder legislation providing a lien in favor of 'contractors' who do not personally perform the labor in the construction of a railroad, and that therefore the provisions of Section 12 hereinbefore set out must be confined or limited to persons who themselves actually perform such labor, and that the term 'laborers' as employed in the title can not be held to extend to or embrace contractors who undertake the work of building or constructing a railroad."

The Supreme Court held squarely that the statute did not apply to contractors. Among other things the court said:

"It is evident, we think, that if we are guided by this well-recognized rule in the interpretation of the term 'laborers,' as used in the title, we will not in so doing defeat the legislative intent. It certainly may be asserted, as there is nothing appearing to the contrary, that the word 'laborers' was used by the legislature in

the common or popular meaning usually accorded to it by lexicographers, as well as by the courts, in their interpretation of such term contained in statutes of similar import as the one here involved. The policy of the legislation enacted under the title in question was to protect a class of persons commonly known as 'mechanics' and 'laborers' who themselves, generally speaking, perform the work or labor which they have contracted to do; or, in other words, persons who by the force of their circumstances depend for their daily or present support upon the wages or compensation received by them for their labor, and to whom, for that reason, among others, the legislature deemed it proper to award a lien to secure the payment of the wages or compensation earned by them. It is clear, we think, that by the term 'laborers' in the title of this act the legislature did not contemplate or intend to extend the legislation so as to include a class of persons known as 'contractors' who usually perform or carry into effect the work which they have undertaken, not by their own labor, but by means of the services of employes, from whose labor they expect to, and generally do, make or secure a profit.

* * * * *

"To construe it so as to include contractors would render it to this extent violative of Section 19, Article 4 of the Constitution, for the reason that this class of persons is not within the scope of the act, of which it forms a part. Counsel for appellee, however, insist that the liens of their clients can be upheld under the provisions of Section 8295, Burns' Ann. St. 1908, which is Section 1, as amended, of the original mechanic's lien act of 1883, *supra*. But so far as this section can be said to have been enlarged by amendment in the attempt to make it apply to and include contractors, it is open and subject to the same constitutional objections. We conclude, for the reasons stated, that appellees are not entitled to the lien and attorney's fees awarded in their favor by the lower court, and the decree or judgment to this extent is erroneous."

FOUR.

A corporation as a contractor is not entitled to a mechanic's lien under the act of 1883 and subsequent amendments thereto.

Ward v. Yarnelle, 173 Ind. 535, 560.

The title of the original act of 1883, known as "The Mechanic's Lien Act of 1883," nor the body of said act, does not include corporations in the class of persons entitled to a lien.

Ward v. Yarnelle, 173 Ind. 535, 560;

Indianapolis Northern Traction Co. v. Brennan,
174 Ind. 1, 87 N. E. 215;

Fleming v. Greener, 173 Ind. 260, 87 N. E. 719;
Cleveland, etc., R. R. Co. v. DeFrees, 173 Ind.
717;

Korbly v. Loomis, 172 Ind. 352.

The title of the mechanic's lien law of 1883 includes three classes of persons only, viz.:

1st, Mechanics;

2d, Laborers;

3d, Material men.

The title is as follows: "An act concerning liens of mechanics, laborers and material men."

The body of said act does not include corporations as entitled to such lien unless it can be said to be included in the word "person" or "persons." But the word "person" or "persons," as used in said act, refers to:

1st, *Persons who are mechanics;*

2d, *Persons who are laborers;*

3d, *Persons who are material men.*

See Acts of 1883, page 140.

Section 1 of this act says, "*mechanics, and all persons performing labor or furnishing material or machinery*" * * *.

Section 12. *All persons who, by contract with any railroad corporation whose road is not in operation over the whole line thereof, or by contract with the lessee of such corporation, shall perform labor or furnish material*" * * *.

These provisions, so far as they refer to corporations, are not changed by subsequent amendments.

Whether or not the word "person" or "persons" includes a corporation when used in a statute, *depends upon the context and purpose of the use of the word*. A corporation cannot be a *person who is a mechanic*, nor can it be a *person who performs manual labor*. Therefore, the legislature did not intend to include a corporation by the use of the word "*person*" who is a mechanic, or "*person*" who performs labor, and hence a corporation is not included and is not one of that class of persons in favor of whom the statute creates a lien.

Indianapolis Northern Traction Co. v. Brennan,
174 Ind. 1, 87 N. E. 215;

Ward v. Yarnelle, 173 Ind. 535;

Thompson on Corporations, 2d Ed., Vol. 3, Section 2716, page 632.

In *Ward v. Yarnelle*, 173 Ind., at the bottom of page 559, and on page 560, the court, in determining the question of the right of a corporation to maintain a mechanic's lien for work and labor performed under a contract, says:

"Treated as a contractor, the construction company could not acquire a lien, for the reason that the title of the act did not embrace contractors. *Fleming v. Greener* (1909), *ante* 260; *Indianapolis, etc., Traction Co. v. Brennan*, 174 Ind. 1.

"As a corporate entity it could not perform labor itself, and therefore could not fall within the class of 'all persons performing labor,' which, as we held in the case of *Indianapolis, etc., Traction Co. v. Brennan, supra*, does not include contractors, and is restricted to those who are commonly known as laborers. The statute being one in derogation of the common law, is to be strictly interpreted as to those who are entitled to make avail of its provisions, but is to be liberally interpreted in their favor when they fall within its provisions. * * * We think the construction company was not a laborer within the letter or spirit of the act, and is not entitled to a lien."

This is the only case in the State of Indiana decided by our Supreme or Appellate Court, prior to the decision of the Circuit Court, where the question of the right of a corporation to have a mechanic's lien had been *directly raised and decided by the court*. There are cases where corporations have enforced liens in the courts, but in none of these cases was the question of the right of a corporation to a lien raised or decided. It is therefore apparent that at the time the decision of the Circuit Court was rendered, it was in harmony with the latest decision of the state court on this proposition also.

FIFTH.

THE DECISION OF THE BRENNAN AND YARNELLE CASES DID
NOT VIOLATE THE CONTRACT CLAUSE OF THE
FEDERAL CONSTITUTION.

It must be conceded that the cases of *Indianapolis Northern Traction Company v. Brennan*, 87 N. E. 215, and *Ward v. Yarnelle*, 173 Ind. 535, announced a doctrine in reference to the enforcement of mechanics' liens which was new in this state. While the Supreme Court did change its

holdings in actions for the enforcement of liens, it did so upon a consideration of constitutional objections and upon an interpretation of the statute, then suggested for the first time.

The most that can be said of the prior decisions relied upon by counsel for Moore-Mansfield Construction Company is that they assumed the validity of those clauses of the mechanic's lien acts applicable by their terms to contractors and railroads.

This falls far short of an express decision of the point decided in *Indianapolis Northern Traction Company v. Brennan*, and especially so in view of the well established rule that the decision of a court of last resort is only authority as to points actually presented by the record and decided, and that the court will uniformly avoid declaring an act unconstitutional except where the question of its constitutionality is raised and clearly demonstrated.

These propositions are decided in the case of *Boyd v. Alabama*, 94 U. S. 645, in which the defendant had been indicted under a law of Alabama for carrying on a lottery. He claimed in defense the right to carry on the lottery under a statute passed in October, 1868, which had been repealed in March, 1871; this statute required defendant, before operating his lottery, to deposit \$2,000 annually in the state treasury for the benefit of the school fund; the defendant had been theretofore indicted for a similar offense and the Supreme Court held in that case that the statute in question constituted a contract, and that the repealing act was void, but the question as to whether the statute was constitutional was not raised by the state. From a conviction for operating the lottery, the defendant appealed to the Supreme Court of Alabama, where his conviction was sustained, and the cause was thereafter removed by a writ of error to the Supreme Court of the United States. This court held that

the former decision of the Supreme Court of Alabama did not preclude it from subsequently holding the statute to be invalid and said:

"Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court, upon the constitutionality of the acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the act of 1868, the court was not precluded by the previous decisions from freely considering and determining it. Having considered it, the court came to the conclusion that the act could not be sustained. It appears that the Constitution of the state declares that 'each law shall contain but one subject, which shall be clearly expressed in its title.' The object of this provision, said the court, was to prevent abuses which had grown up, to the scandal of legislative bodies; and, using the language of a previous decision, to prevent deception, by including in a bill matters incongruous with the title. Whilst observing that it was necessary to be careful in the application of the doctrine, so as not to cripple and embarrass legislation, and expressing doubts whether the act authorizes a lottery for money, the court said: 'But, granting that this right to set up and carry on a lottery is conferred in the body of the statute, it is not expressed in the title. Never was language employed less apt to convey to the mind, learned or unlearned, the idea that the partnership association, the mutual aid society, was to be an un-

disguised lottery, and that the encouragement of letters, the promotion of science and the arts, which it proposed, was the uncertain prize in currency which might fall to the ticket holder; and, because the object is not thus expressed, the act was declared to be unconstitutional. We can not refuse to give effect to that decision. It is the province of the Supreme Court of the State to construe its own constitution and laws; and, when it decides that one of its laws is not authorized by its constitution, it is not for us to deny the correctness of the decision, when there is no evasion in this way of federal authority."

The principle thus laid down by the Supreme Court of the United States has also found expression in the following cases:

Louisiana & N. R. Co. v. R. R. Commission,
157 Fed. 944;
Knight v. Shelton, 134 Fed. 423, 437;
U. S. v. Powell, 151 Fed. 648.

The mechanic's lien statutes in question do not create new rights, but merely provide an additional remedy for collecting an existing debt.

Hall v. Bunte, 20 Ind. 304;
Colter v. Frese, 45 Ind. 96 (at p. 112);
Hanes v. Wadey, (Mich.) 2 L. R. A. 498;
Best v. Baumgardner, (Pa.) 1 L. R. A. 356.

The repeal of a statute providing a remedy for the enforcement of a contract by the foreclosure of a mechanic's lien is not within the prohibition of the contract clause of the Federal Constitution.

Hanes v. Wadey, (Mich.) 2 L. R. A. 498;
Best v. Baumgardner, (Pa.) 1 L. R. A. 356;
Watson v. New York Cen. R. R. Co., 47 N. Y.

In the case of *Hall v. Bunte, supra*, the question involved was whether a mechanic's lien statute was within the title of an act which read as follows:

"An act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the courts of this state; to abolish distinct forms of actions at law, and to provide for the administration of justice, in a uniform mode of pleading and practice, without distinction between law and equity."

The Supreme Court of Indiana held that the title did cover such remedy, for the reason that a mechanic's lien is simply one of the means provided for the *enforcement* of an obligation. In this connection the court said:

"We think the law may be maintained on the principle that the lien is simply one of the means provided to enable the mechanic to collect his debt. This law does not give the mechanic the right to his debt, that he has without the statute in question; but it furnishes him this remedy for its collection."

In *Hanes v. Wade, supra*, the question involved was whether a lien given by statute might be repealed or amended by the power that created it without impairing the obligation of a contract. The question which we have under consideration here was directly involved and decided. The Supreme Court of Michigan held that the lien was essentially a creature of statute and not a part of the contract; that the law created the lien merely as an *additional remedy*; that it could be repealed at the pleasure of the legislature (and, of course, it follows that the law could be changed by a decision of the court) without impairing the obligation of a contract. *Inter alia*, the court said:

"But the weight of authority is decidedly against this claim. The lien given by the statute is no part of the contract. Without the statute creating the lien, the debtor was bound to pay the creditor the same as he would be with the lien. He had before this the common-law remedies to enforce the collection of his debt. The statute giving him a lien does not take away any remedy under the common law, but adds another, by fixing a lien upon the premises in case he sees fit to enforce it. *This lien does not grow out of the contract*, but depends entirely upon the statute for its existence. It derives its validity from positive enactment of the legislature, and is liable always to be modified, altered or repealed by the same power that created it." (Our italics.)

It had been established by the decisions of the Supreme Court of Indiana long prior to the execution of the Moore-Mansfield contract that mechanic's lien statutes were remedial only and as such conferred no vested rights.

Hall v. Bunte, 20 Ind. 304;

Colter v. Frese, 45 Ind. 96 (at p. 112).

The provision in the Federal Constitution inhibiting the impairment of the obligation of a contract, has for its very essence the idea of mutuality. The word "contract" is there used in its ordinary sense, as signifying the agreement of two or more minds, to do or refrain from doing something.

Morley v. Lake Shore, etc., R. Co., 146 U. S. 162, 169;

Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 629;

Cyc., Vol. 8, p. 930;

Louisiana v. New Orleans, 109 U. S. 285, 288;

Garrison v. City of New York, 21 Wall. 196, 203;

Essex Public Road Board v. Skinkle, 140 U. S. 334, 340, and authorities there cited;

Freeland v. Williams, 131 U. S. 405, 413, 414.

A mechanic's lien is created by statute and not by contract, and under the authorities cited, it follows that the lien has not that mutuality which constitutes the obligation of a contract, which is protected from impairment by the Federal Constitution.

The following language by Mr. Justice Shiras, in the case of *Morley v. Lake Shore, etc., R. Co.*, *supra*, is particularly pertinent in this connection:

"It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. 'A judgment is in no sense a contract or agreement between the parties.' *Wyman v. Mitchell*, 1 Cowen 316, 321. In *McConn v. New York Central, etc., Railroad*, 50 N. Y. 176, 180, it was said that 'a *statute liability* wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract.' In *Bidleson v. Whytel*, 3 Burrow, 1545, it was held by Lord Mansfield, after great deliberation and after consultation with all the judges, that 'a judgment is no contract, nor can be considered in the light of a contract for *judicium red-*

ditur in invitum.' To a *scire facias* on a judgment, entered in 13 Car. II, the defendant for plea alleged that the contract upon which recovery was had was usurious, to which plea the plaintiff demurred, saying that judgments can not be void upon such a ground, since by the judgment the original contract which is supposed to be usurious is determined, and cited the case of *Middleton v. Hall* (Gouldsb. 128; S. C. sub. nom. *Middleton v. Hill*, Cro. Eliz. 588). And according to this the plea was ruled bad and judgment given for the plaintiff. *Rowe v. Bellaseys*, 1 Siderfin 182. 'To a *scire facias* on a judgment by confession the defendant pleaded that the warrant of attorney was given on an usurious contract. And upon demurrer it was held that this was not within the statute 12 Anne (of usury), or to be got at this way, for this is no contract or assurance, a judgment being *redditum in invitum.*' *Bush and Others v. Gower*, 2 Strange 1043. In *Louisiana v. New Orleans*, 109 U. S. 285, 288, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the Federal Constitution as such, it was said that 'the term "contract" is used in the constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence.' *Where the transaction is not based upon any assent of parties it can not action is not based upon any assent of parties it can not be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition.* *Garrison v. City of New York*, 21 Wall. 196, 203. It is true that in *Louisiana v. New Orleans*, and in *Garrison v. City of New York*, the causes of action merged in the judgments were not contract obligations; but in both those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio vigore.*" (Our italics.)

And again, in the case of *Garrison v. City of New York*, *supra*, the court said:

"But it is not perceived how this fiction can convert the result of a proceeding not founded upon an agreement, express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulation of parties against any state interference. *If no assent be given to a transaction no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition.*" (Our italics.)

The mechanic's lien in this case is not based upon any assent of the parties; it is a creature of the statute; it flows as a natural result from the contract of the parties, provided the materialman or laborer brings himself within the terms of the statute and as long as that statute is in force. But it is not a contract, nor is the materialman or laborer deprived of his right under the law to sue the person to whom he has furnished the material for the value thereof. In other words, he is left with a complete legal remedy when the lien has been taken away, and it is no answer to this argument to say that the legal remedy remaining may not enable him to collect his debt.

In this connection, it must also be borne in mind that when the Moore-Mansfield contract was executed, that company contracted with reference to the mechanic's lien law as then declared by the highest courts of Indiana, and the contract necessarily included that portion of the law which declared that the lien given by statute was not a matter of substantive right, but was remedial merely and subject to the state's right to abolish it at will.

- Hall v. Bunte*, 20 Ind. 304;
Colter v. Frese, 45 Ind. 96, 112;
Rockwell v. Hubbell, 2 Doug. (Mich.) 197-202;
Woodbury v. Grimes, 1 Colo. 100;
Bailey v. Mason, 4 Minn. 546;
Templeton v. Horne, 82 Ill. 491;
Watson v. New York Central Railroad Co., 47
 N. Y. 157;
Frost v. Ilsley, 54 Maine 345;
Martin v. Hewitt, 44 Ala. 418, 435;
Moore v. Holland, 16 S. C. 15;
Smith v. Newbaur, 144 Ind. 96;
Hanes v. Wadey, *supra*;
Best v. Baumgardner, *supra*;
Cooley's Constitutional Limitations (5th Ed.),
 443;
Parker v. Buckner, 67 Tex. 20;
Blount v. Windley, 95 U. S. 173.

Mr. Cooley, in his work on Constitutional Limitations, says:

"Again, the right to a particular remedy is not a vested right. This is the general rule, and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right of equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains. * * *"

The above quotation is from Section 362 of the Fifth Edition. In Note 1, the author says: "See *ante* p. *290 and cases

cited. It has been held in some cases that the giving of a lien by statute does not confer a vested right, and it may be taken away by a repeal of the statute. See *ante* *287, note."

In *Woodbury v. Grimes*, *supra*, the main question involved was whether the repeal of a mechanic's lien statute under which the right to a lien had already accrued, impaired the obligation of a contract. The Supreme Court of Colorado, in discussing this proposition, said:

"Now a debt can not be due except upon a contract, express or implied, and, therefore, the act assumes the existence of a contract, but does not create it. Furthermore, the common law gives an action to recover the value of labor and material furnished, and, therefore, in every case of lien under the statute there was a perfect contract and a common-law remedy to enforce it independent of the statute. We are, then, authorized to say that the act of 1864 gave a new and additional remedy in a familiar class of cases. If we contrast this new remedy with the pre-existing common law remedy, we shall find that the debtor was equally bound to pay his creditor under both of them; in other words, the statute did not increase or diminish the obligation to pay previously resting upon the debtor. The statute enabled the creditor to appropriate the land upon which he labored, and placed his materials, together with the structure which he erected, to the payment of his debt, but it did not add to the legal liability of the debtor arising from the contract to pay his creditor. Both before and after the passage of the act, the common law gave to the creditor the right to resort to the property of the debtor for the purpose of satisfying his demand, so that, in this respect, the new remedy was not different from the old. * * * Now we understand that legislative interference among the creditors and grantees of a debtor, which has the effect to postpone one for the benefit of another, is not prohibited by the constitution."

The Supreme Court of Minnesota has also passed upon this same question in the case of *Bailey v. Mason, supra*, wherein it is said:

"The lien of the mechanic, builder, or materialman, upon the building and real estate, does not arise out of his contract, but depends on the statute alone for existence. It is a preference which he may secure if he proceeds in a particular way, but if, before he has fully perfected these proceedings, the legislature sees proper to repeal the law, he really loses nothing—he is merely unable to secure an advantage which, without the statute, he is in no wise entitled to."

In the case of *Templeton v. Howe, supra*, the Supreme Court of Illinois says:

"No doubt the law of 1869, if it had the effect to impair the obligation of contracts previously made, to that extent would be inoperative and void. But no such results flow from it. All it does, is simply to change the mode by which the lien given by statute for enforcing performance of the contract is to be established. Other remedies of which the parties might have availed were not changed. Contracts previously made were in nowise affected. Their terms were neither enlarged nor abridged. The lien given the mechanic is purely statutory and does not arise out of any contract. Remedies which the law affords to enforce contracts constitute no part of the contracts themselves. * * *"

In *Frost v. Ilsley, supra*, the Supreme Court of Maine said:

"The lien is the creature of the statute. It is no part of the contract, but a merely incidental accompaniment, deriving its validity from positive enactment and liable always to be controlled, modified or taken away by subsequent enactment, and such modification or removal can not be considered as in any

degree impairing the obligation of the contract itself. The lien is but a means of enforcing the contract, a remedy given by law, and like all matters pertaining to the remedy, and not to the essence of the contract, until perfected by proceedings whereby rights in the property over which the lien is claimed have become vested, it is entirely within the control of the law-making power, in whose edict it originated.
* * *

While the Federal Courts will exercise an independent judgment touching the construction of state statutes and constitutions which have been brought in question subsequent to the execution of a contract claimed to be affected thereby, they will nevertheless give much weight to the decisions of the state courts bearing upon the question, even where such questions do not arise under constitutional or statutory provisions peculiar to the particular state.

Great Southern, etc., Company v. Jones, 193 U. S. 532;

Jones v. Great Southern, etc., 86 Fed. 370.

In the cases last cited the Federal Courts declined to follow the decisions of the Supreme Court of Ohio with reference to the constitutionality of an Ohio statute, where it was claimed that the Supreme Court had departed from established rules existing when the contract in suit was made; but in doing so both the Circuit Court of Appeals and the Supreme Court of the United States emphasized the fact that the constitutional question involved was not peculiar to Ohio, but was one of general application.

Opinion by Lurton, Judge, 86 Fed. p. 376;

Opinion by Mr. Justice Harlan, 193 U. S. 548.

The cross-complainant, Moore-Mansfield Construction Com-

pany, relies upon the proposition that the remedy for the enforcement of a contract can not be repealed or materially lessened without violating the Federal Constitution. Many, although not all, of the cases cited involve bond issues. In such cases it has been held that:

"Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void."

Mobile v. Watson, 116 U. S. 289, 305, and cases there cited.

In such cases the sole resource for the payment of the bonds was taxation and the repeal of the taxing act left the bondholders without any adequate legal remedy. In our case, the resource for the payment of the contract price was the individual liability of the company and the right to subject its property to judicial process for the payment of a debt. All that has been done is to declare that the contractor has no right to a lien. If such a right existed it did not arise out of contract.

No one will contend, that the legislature can impair the obligation of a contract, but no such effort has been made in this case. *The contract rights* of the Construction Company are absolutely unaffected. In addition thereto an adequate legal remedy remains. The obligation of the contract is not destroyed or impaired, and there is still left a complete legal means of enforcing this obligation.

SIXTH.

THE DECISION OF THE CIRCUIT COURT WAS NOT ERRONEOUS WHEN RENDERED AND SHOULD NOT, THEREFORE, BE REVERSED MERELY BECAUSE PENDING THE APPEAL THE SUPREME COURT OF INDIANA HAS OVERRULED ITS PREVIOUS DECISIONS WHICH WERE FOLLOWED BY THE CIRCUIT COURT IN THE DECISION OF THIS CASE.

We have already shown that at the time this case was decided by the Circuit Court the latest decisions of the Supreme Court of Indiana denied in unmistakable terms the protection of the mechanic's lien law to corporations and contractors.

Indianapolis Northern Traction Company v. Brennan, 87 N. E. 215;

Ward v. Yarnell, 173 Ind. 535.

We believe those decisions were not only authoritative but that they were absolutely right in principle. It seems impossible to escape the conclusion reached by the Supreme Court of Indiana in those cases that neither corporations nor contractors are "laborers" or "mechanics" within any proper definition of that term. If not, appellant had no standing, irrespective of the question of waiver, to enforce a mechanic's lien in this case. The entire claim is for labor performed. No part of it is for materials furnished. The title of the Indiana statute, as shown by the decisions last above cited, did not admit of the inclusion in the body of the act of either corporations or contractors. In the absence of a title broad enough to include these classes, they can not under the constitution of Indiana be brought within the protection of the statute.

If, therefore, the question had been one not theretofore decided by the Supreme Court of Indiana, it is difficult to conceive that the decision of the Circuit Court could have been

different, but in view of the two decisions referred to, the duty of the Circuit Court to declare the law as it did seems doubly obvious.

We believe we have already shown under another head that the decisions of the Supreme Court of Indiana which were followed by the Circuit Court did not violate the Federal Constitution. It therefore remains to inquire whether the judgment of the Circuit Court should be reversed merely because the Supreme Court of Indiana has since the appeal overruled the Brennan and Yarnell cases. It seems clear to us that no such course is admissible under the circumstances of this case. It is true that the bonds secured by appellee's mortgage were issued and sold prior to the decision of the Yarnell and Brennan cases; but public policy strongly inclines to the protection of such securities, which the court judicially knows are constantly changing hands after they are placed on the market. While, therefore, the Federal Courts will ordinarily follow the State Courts in the construction and application of state constitutions and statutes, the rule does not go so far as to require the reversal of a judgment which was right when it was rendered because the state court has overruled its former decisions.

Morgan v. Curtenius et al., 20 Howard 1;

Burgess v. Seligman, 107 U. S. 20;

Messinger v. Anderson, 171 Fed. 785-795;

Presidio County v. Noel-Young, etc., Co., 212 U. S. 58-73;

Kuhn v. Fairmount Coal Company, 215 U. S. 349-357.

The language of this Court in *Morgan v. Curtenius*, *supra*, is peculiarly applicable to the case at bar. We venture to quote the concluding paragraph:

"If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois, this Court might have been com-

pelled to decide whether they considered themselves bound to follow the last decision of that Court or at liberty to choose between them. But, however the latter decision may have a retroactive effect upon the titles held under the deed in question, it can not have that effect upon the decisions of the Circuit Court and make them erroneous, which was not so when the judgment of that Court was given."

It is true that at the time the contracts of February 21st, 1906, and June 6th, 1906, were executed, the decisions in the Yarnell and Brennan cases had not been rendered, and that it had been assumed (though never decided) in previous cases that contractors were within the protection of the mechanic's lien act. These decisions might, in the absence of the latter cases, have inclined the Circuit Court to so hold in the case at bar. But before this case was decided the Supreme Court of Indiana, after the fullest possible consideration established the rule as declared by the Circuit Court. Under these conditions it seems to us a strange perversion of the rule of comity to say that it was the duty of the Circuit Court to disregard the latest decisions in which the questions were directly presented and considered and follow certain earlier decisions, where the contrary was merely assumed. And if the Circuit Court was right in following the latest decisions of the Supreme Court rendered prior to the decision of this case, a reversal of the judgment involves a complete surrender of the independent judgment which the Federal Courts are entitled to exercise.

We respectfully submit that for the reasons presented the judgment of the Circuit Court should be affirmed.

W. H. H. MILLER,

C. C. SHIRLEY,

S. D. MILLER,

W. H. THOMPSON,

Solicitors for Appellee.

Marion Trust Company, Trustee.

